Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
MEMORANDUM
1350 Pennsylvania Avenue, NW, Washington, DC 20004

TO:	Nyasha Smith, Secretary of the Council
FROM:	Charles Allen, Chairperson, Committee on the Judiciary and Public Safety CA
RE:	Closing Hearing Record
DATE:	March 8, 2022

Dear Ms. Smith,

Please find attached copies of the Hearing Notice, Agenda and Witness List, and testimony for the Committee on the Judiciary and Public Safety's December 16, 2021 Public Hearing on B24-0416, the "Revised Criminal Code Act of 2021".

The following witnesses testified at the hearing or submitted written testimony to the Committee:

i. Public & Government Witnesses

1. Richard Schmechel, Executive Director, Criminal Code Reform Commission
2. Chris Geldart, Deputy Mayor for Public Safety and Justice
3. Paul Butler, Albert Brick Professor in Law, Georgetown University Law Center
4. Donald Braman, Associate Professor of Law, The George Washington University Law School
5. Elizabeth Wieser, Deputy Attorney General, Public Safety Division, Office of the Attorney General for the District of Columbia
6. Laura Hankins, General Counsel, Public Defender Service for the District of Columbia
7. Katya Semyonova, Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia
8. Elana Suttenberg, Special Counsel, U.S. Attorney's Office for the District of Columbia
9. Michelle Garcia, Executive Director, Office of Victim Services and Justice Grants
10. Hon. Anna Blackburne-Rigsby, Chief Judge, District of Columbia Court of Appeals
11. Hon. Anita Josey-Herring, Chief Judge, Superior Court of the District of Columbia

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
NOTICE OF PUBLIC HEARING
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

B24-0416, the "Revised Criminal Code Act of 2021"

Thursday, December 16, 2021, 9:30 a.m. – 3:00 p.m.
Virtual Hearing via Zoom
To Watch Live:
https://www.facebook.com/CMcharlesallen/

On Thursday, December 16, 2021, Councilmember Charles Allen, Chairperson of the Committee on the Judiciary and Public Safety, will convene a public hearing to consider Bill 24-0416, the "Revised Criminal Code Act of 2021". The hearing will be conducted virtually via the Zoom platform beginning at 9:30 a.m. and ending no later than 3 p.m. ***This is the Committee's third hearing on the bill, and this hearing is reserved for government witnesses, including members of the Criminal Code Reform Commission's Advisory Group.***

The District's current criminal code is a patchwork of laws that were written at various times by different legislative bodies. Many of its provisions have rarely, if ever, been updated to use contemporary language. For example, important terms are frequently undefined, and requisite culpable mental states are unspecified. Penalties have been set haphazardly, leading to sentences that are disproportionate to the offense at issue or the harm caused. These problems have accumulated over time, resulting in an aging criminal code that is antiquated, inaccessible to laypeople and criminal justice practitioners alike, and that does not reflect current community sentiment and norms.

The Criminal Code Reform Commission ("CCRC"), first established in 2006 as a project within the District of Columbia Sentencing and Criminal Code Revision Commission, was created to address these issues with the District's criminal code and propose model reforms. The Fiscal Year 2017 Budget Support Act of 2016 later established the CCRC as an independent agency tasked with submitting recommendations to the Mayor and Council for modernizing the District's criminal code to improve its clarity, consistency, completeness, and proportionality. In addition to its own staff, the CCRC's recommendations were informed by an Advisory Group, including representatives from the U.S. Attorney's Office for the District of Columbia, the Office of the Attorney General, the Public Defender Service for the District of Columbia, as well as law professors from George Washington University and Georgetown University. The Advisory Group

provided written and oral comments to the CCRC throughout the fifteen-year review and drafting process.

On March 23, 2021, the five voting members of the CCRC's Advisory Group voted unanimously to approve the CCRC's final recommendations. The CCRC submitted its report containing those recommendations to the Mayor and Council on March 31, 2021. The recommendations include numerous improvements over the current code, including a "General Part" that provides definitions for commonly used terms, rules of liability, rules of interpretation, legal defenses, and a standardized penalty classification scheme. It also includes a "Special Part" that provides newly revised language for nearly three hundred offenses and gradations. B24-0416 would translate the CCRC's recommendations into law.

The stated purpose of B24-0416, as introduced, is to:

- Enact a new Title 22A of the District of Columbia Code, "Revised Criminal Code", and to repeal the corresponding organic legislation in the current Title 22;
- Amend the Firearms Control Regulations Act of 1975 to revise the current unauthorized possession of a firearm or destructive device offense, the current unauthorized possession of ammunition offense, the current possession of a stun gun offense, and the current unlawful storage of a firearm offense; repeal the current possession of self-defense spray offense; codify a new carrying an air or spring gun offense; and codify a new carrying a pistol in an unlawful manner offense;
- Amend Title 16 of the District of Columbia Official Code to revise the jury demandability statute, the criminal contempt for violation of a civil protection order statute, and the parental kidnapping statutes;
- Amend Title 23 of the District of Columbia Official Code to revise the failure to appear after release on citation or bench warrant bond offense, the failure to appear in violation of a court order offense, and the criminal contempt for violation of a release condition offense;
- Amend the District of Columbia Work Release Act to revise the violation of work release offense;
- Amend An Act to Establish a Board of Indeterminate Sentence and Parole for the District of Columbia and to determine its functions, and for other purposes, to revise authorized terms of supervised release for all crimes and repeal imprisonment terms for select crimes addressed elsewhere;
- Amend section 25-1001 of the District of Columbia Official Code to revise the possession of an open container of alcohol offense;
- Amend An Act To establish a code of law for the District of Columbia to abolish common law criminal offenses;
- Amend the District of Columbia Uniform Controlled Substances Act of 1981 to revise various drug offenses;
- Amend the Drug Paraphernalia Act of 1982 to repeal and revise various drug paraphernalia offenses;
- Repeal archaic criminal offenses in the District of Columbia Code; and
- Make other technical and conforming changes to statutes in the current District of Columbia Code.

For public witnesses who were unable to testify at the Committee's November 4, 2021 or December 2, 2021 hearings, written statements can still be made part of the record. Witnesses who would like to provide written testimony on the bill should email their testimony to the Committee at judiciary@dccouncil.us no later than the **close of business on Friday, December 24, 2021**.

Council of the District of Columbia
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
AGENDA & WITNESS LIST
1350 Pennsylvania Avenue, N.W., Washington, D.C. 20004

COUNCILMEMBER CHARLES ALLEN, CHAIRPERSON
COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY

ANNOUNCES A PUBLIC HEARING ON

B24-0416, the "Revised Criminal Code Act of 2021"

Thursday, December 16, 2021, 9:30 a.m. – 3:00 p.m.
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https://www.facebook.com/CMcharlesallen/

AGENDA AND WITNESS LIST

I. CALL TO ORDER

II. OPENING REMARKS

III. WITNESS TESTIMONY

i. Public & Government Witnesses

1. Richard Schmechel, Executive Director, Criminal Code Reform Commission
2. Chris Geldart, Deputy Mayor for Public Safety and Justice
3. Paul Butler, Albert Brick Professor in Law, Georgetown University Law Center
4. Donald Braman, Associate Professor of Law, The George Washington University Law School
5. Elizabeth Wieser, Deputy Attorney General, Public Safety Division, Office of the Attorney General for the District of Columbia
6. Laura Hankins, General Counsel, Public Defender Service for the District of Columbia
7. Katya Semyonova, Special Counsel to the Director for Policy, Public Defender Service for the District of Columbia

8. Elana Suttenberg, Special Counsel to the U.S. Attorney for Legislative Affairs, United States Attorney's Office for the District of Columbia

IV. ADJOURNMENT

D.C. Criminal Code Reform Commission
441 Fourth Street, NW, Suite 1C001S, Washington, D.C. 20001
(202) 442-8715 www.ccrc.dc.gov

Friday, December 24, 2021

The Honorable Charles Allen
Chairman, Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, NW
Washington DC 20004

Dear Councilmember Allen:

Below is a copy of my testimony for the December 16, 2021 hearing on the "Revised Criminal Code Act of 2021" (RCCA). The testimony includes a copy of my oral testimony and an addendum providing additional information concerning various matters raised in testimony by other witnesses that I was not able to respond to fully at the time.

In addition, by reference here, I wish to submit for the record the complete recommendations (statutory language and legal commentary) as approved by the agency's Advisory Group and submitted to the Council and Mayor on March 31, 2021, as well as the transmittal letter and various supporting materials (analysis of court statistics, references to law in other jurisdictions, etc.) that were submitted to the Advisory Group in preparation for its final vote. The complete recommendations, transmittal letter, and supporting materials submitted for the record are as follows, with links to the documents posted on the agency's website:

CCRC Executive Director Transmittal Letter to the Mayor and Council (March 31, 2021).

Recommendations:

- Revised Criminal Code (RCC) Compilation;
- Commentary on Subtitle I;
- Commentary on Subtitle II; and
- Commentary on Subtitles III-V, Statutes Outside Title 22, Statutes to Repeal.

Supporting Materials:

- Appendix A. Table of Correspondence – RCC to Current D.C. Code Statutes;
- Appendix B. Table of Advisory Group Draft Documents;
- Appendix C. Advisory Group Comments on Draft Documents;
- Appendix D. Disposition of Advisory Group Comments & Other Changes From Draft Documents;

- Appendix E. Table of RCC Specific Offense Classifications;
- Appendix F. District Charging and Conviction Data 2010-2019, 2015-2019 and 2018-2019;
- Appendix G. Comparison of RCC Offense Penalties and District Charging and Conviction Data;
- Appendix H. DC Voluntary Sentencing Guidelines Rankings;
- Appendix I. Public Opinion Data;
- Appendix J. Research on Other Jurisdictions' Relevant Criminal Code Provisions; and
- Appendix K. Future Issues to be Addressed and Known Conforming Amendments.

These materials are critical context for the bill. The RCCA presents in bill form the statutory language from the CCRC recommendations approved by the Advisory Group March 24th, 2021 and submitted to the Council and Mayor March 31st, 2021. The bill makes only non-substantive changes concerning numbering, formatting, drafting, and citations to the Advisory Group's approved statutory text. The changes for the bill were made in consultation with the Council's Office of General Counsel. A full list of the changes and a table comparing the numbering of provisions in the RCCA to the corresponding numbering of provisions approved March 24th is available on the agency's website.

Richard Schmechel
Executive Director
D.C. Criminal Code Reform Commission

*******Oral Testimony*******

Introduction

Good morning Chairman Allen, thank you and your staff for holding this third hearing on the "Revised Criminal Code Act of 2021" (RCCA), submitted by the D.C. Criminal Code Reform Commission (CCRC). During the first two days of hearings we heard from subject matter experts, multiple victims rights groups, people with lived experience in the incarceration system, and other public witnesses who *unanimously* gave their general support for the bill. A number of witnesses said more should be done to reduce penalties or decriminalize drug possession, and a few concerns were raised about the drafting of specific provisions and resource availability to successfully implement the reforms. The broad consensus that the bill should be passed, however, is a testament to the need for comprehensive modernization and the careful process used to assemble this bill. As the Committee looks toward finalizing the bill next summer and fall and planning for implementation, the CCRC stands ready to assist.

I also want to thank the CCRC's many former Advisory Group members testifying today for their years of work on the bill's language. Realizing the need to go beyond what piecemeal legislative efforts could accomplish in the past, the District has invested considerable time and resources to develop a plan for comprehensive reform of the criminal code. Legislation in 2006 first mandated the development of code reform legislation to the Sentencing Commission and for nearly a decade work was done with government partners there but without results. Undeterred, the Council then created the CCRC about five years ago and directed it to provide recommendations that improve the clarity, consistency, completeness, organization, and proportionality of criminal statutes. The CCRC was directed to examine model codes and best practices in other jurisdictions, as well as relevant court statistics. But the most critical aspect of the process set out in the agency's statute was the designation of an Advisory Group with connections throughout the criminal justice community to provide comments on all the agency's drafts. There were seven Advisory Group members: representatives of the District's Attorney General, the U.S. Attorney for the District, the D.C. Public Defender Service, the Deputy Mayor for Public Safety, and this Committee—as well as Professors Don Braman and Paul Butler. The Advisory Group held years of monthly meetings with staff, all open to the public, and gave hundreds of pages of written comments on drafts. Staff in turn addressed in writing how and why every comment was accepted or rejected. In the end all five voting members of the Advisory Group approved submission of the CCRC recommendations to the Mayor and the Council on March 31st. It has been a multi-year, transparent, research driven process working with the Advisory Group to develop the RCCA now before you, and I am very grateful.

On the first day of hearings, I spoke to the problems that exist in the current criminal code, the pressing need for reform, and the main features of the RCCA. Today, I want to focus more on the bill's comprehensive changes to penalties. I briefly will address: (1) how the topmost penalties were set; (2) how other penalties were ordered and set; (3) why mandatory minimums were rejected; (4) why proportionality is about all applicable penalties for behavior, not just one crime; and (5) why there needs to be a judicial review of long-term sentences to see if they still serve public safety and justice. I also want to point out some of the current research on how long imprisonment sentences affect public safety as well as data on the extreme racial disparity in incarceration in the District.

#1. How the Topmost Penalties Were Set.
No specific numbers for a criminal code's imprisonment penalties are widely accepted or expert-recommended because there are so many different values at stake. However, there is some agreement among experts about the topmost penalty. The Model Penal Code's recently revised sentencing provisions, issued by American Law Institute,[1] provides the most authoritative recommendations on the matter. They recommend that the most severe penalty in non-death penalty jurisdictions should be life *with* the possibility of release. Below that, the MPC says that the way specific penalties are assigned "are fundamental policy questions" and "questions with answers that change over time."[2] The RCCA follows the MPC recommendation by setting the penalty for the most severe crime, first degree murder, at 40 or 45 years depending on aggravating factors. The 40 or 45 year top numbers are based on the under-69 year average life expectancy of those typically convicted of murder in the District.[3] They are realistic approximations of life *with* the possibility of release.

#2. How Other Penalties Were Ordered and Set.
While there is no consensus on specific punishment numbers, commonsense logic and well-established norms do provide a relative order of penalties for offenses of the same type. There is broad agreement that along the same spectrum, a mere threat of causing bodily injury or a failed attempt to do so is not as serious as actually causing such an injury. An assault that causes a bodily injury like a simple bruise is not as bad as a deep cut requiring help from a medical professional. An injury that puts a person at risk of death is worse still, and killing someone is the greatest bodily injury. While they may differ as to the exact penalty associated with the harms, virtually all criminal codes nationally differentiate bodily injury harms and their authorized penalties from murder at the top down to the most minor unwanted touching at the bottom. The RCCA does the same. Below the most severe penalty for murder at 40 or 45 years, the bill provides lower penalties that differentiate lesser types of bodily injuries, in similar ways and with similar penalties as the current D.C. Code.

For insight on offenses other than assault-type crimes, the CCRC conducted a large, 400-person, demographically-weighted survey of District voters. Residents were presented with short scenarios, such as a person stealing $5,000, and asked how that conduct as a whole compared to various assault-type harms. In this way the agency was able to map out the public's view of the relative severity of a multitude of behaviors compared to assault-type crimes inflicting bodily injuries. I don't want to overemphasize the importance of the survey findings—D.C. Courts sentencing data and other sources also were used to develop the new penalties. But, it is notable that the commonsense rankings by today's District voters often differed sharply from those authorized in the D.C. Code.

#*3*. Why Mandatory Minimums Were Rejected.
A criminal code's authorized penalties must account for both the worst and least serious ways that prohibited conduct can be committed. When people think of a crime they may envision a specific scenario. But, in setting a code's statutorily authorized punishments, the penalty must fit the full range of ways the covered conduct can occur. Unlike sentencing guidelines that are built around typical facts, a wider range of sentences, low and high, must be authorized in statutes to account for rare scenarios. Mandatory minimum sentences that do not fit the least harmful forms of an

offense are not justifiable and, following the recommendations of the Judicial Conference of the United States,[4] the Model Penal Code,[5] and the American Bar Association,[6] and statements by U.S. Attorney General Merrick Garland,[7] the RCCA ends mandatory minimums. Conversely, statutory maximums that do not account for the most severe form of an offense also are not justifiable—which leads to my fourth point.

#*4.* Why Proportionality is About *All* Applicable Penalties, Not Just One Crime.
All of a criminal code's chargeable crimes must be considered when determining whether its penalties fit the offender's conduct. When the law authorizes multiple punishments through variously named crimes for what in reality was a single instance of conduct, prosecutors have the discretion to charge all applicable crimes. Judges then generally have the discretion then to set sentences for those crimes to run consecutive to one another, so that the imprisonment sentences for multiple convictions are additive, stacking one after another. The upshot is that looking at the penalty for just *one* of the crimes that can be charged based on the offender's behavior often is misleading as to the liability the law actually imposes. What matters is whether the *total* amount of imprisonment authorized under the criminal code as a whole, with all its overlapping ways of criminalizing behavior and various enhancements, is sufficient. The RCCA drafts offenses to minimize the possibility of multiple punishments arising for one instance of behavior and, when overlapping charges are necessary, adjust penalties to account for the overlap.

#*5.* Why There Needs To Be A Judicial Review Of Long Term Sentences To See If They Still Serve Public Safety and Justice.
Even the best designed sentencing laws implemented by the most skillful judges can still get it wrong. District judges are not infallible and cannot see into the future. They must work with imperfect information about potential threats to public safety, the likelihood of rehabilitation, and try to track ever-evolving public norms about the seriousness of criminal behavior.[8] Parole laws and regulations in most other jurisdictions provide much earlier opportunities for release for those serving long-term sentences. Unfortunately, in the District, Federal law has eliminated the District's Parole Board,[9] limited reductions in incarceration for good behavior to a maximum of 15%,[10] and deprived the Mayor of commutation and exoneration powers ordinarily available to the head of the Executive Branch.[11] Consistent with the Model Penal Code's sentencing recommendations,[12] the revised statute provides judges with an opportunity to reassess the continued justification for incarceration of an individual after at least 15 years of time served. This helps ensure the *ongoing* proportionality of punishments in the District's criminal justice system by permitting sentence modification when the court finds there is no further threat to public safety. The change mitigates some of the harm caused by federal limitations on parole in the District.

Closing
In closing, I want to say just a few things about public safety and race which are deeply entwined with what decisions the Council makes about changing imprisonment penalties.

First, any level of violent crime is too much and the current increase in homicide spike is deeply troubling.[13] But, it also is important to recognize that overall levels of violent crime in the District have been steady the last few years according to MPD data,[14] are near the lowest in decades per FBI data,[15] and are at about a third of the peak violence in the early 90s. There is no reason to believe that the moderate penalty reductions in the RCCA, as compared to current Superior Court

practice,[16] will lead to an increase in crime. As the National Research Council summarized, the evidence is clear that "long sentences have little marginal effect on crime reduction through either deterrence or incapacitation."[17] Other states have successfully lowered their incarceration rates through sentencing changes *and* seen decreases in crime.[18] The District can too.

Second, the Council's decision, whether to maintain the status quo, to follow the penalty changes in the RCCA, or to take another path on sentencing is primarily about the futures of young Black men in the District. In the 55,806 Superior Court cases with race and gender data analyzed this past decade, we found that 76.9% of the defendants were Black males even though they comprised only 20% of the population.[19] Objectively, the District has one of the highest incarceration rates in the country or world.[20] Given these facts, absent clear evidence that longer sentences are necessary for public safety, reducing authorized penalties is compelling as a matter of racial justice.

This bill does not fix all the problems or inequities in the current criminal code. The bill remains mostly based on the current system's choices about what is worthy of criminalization and still provides high incarceration penalties. It is both a major step forward and also moderate. I hope the Council will pass the RCCA but will not cease to look for further ways to improve the District's criminal laws. The CCRC is here to assist. Thank you.

*******Addendum to Oral Testimony*******

At the December 16, 2021 hearing on the "Revised Criminal Code Act of 2021" (RCCA) USAO Special Counsel Elana Suttenberg and Deputy Mayor for Public Safety& Justice (DMPSJ) Chris Geldart stated that they generally supported the RCCA but listed certain detailed concerns that I was not able to fully respond to at the time.

To fill out and clarify the record, I would respectfully note the following and, regarding concerns raised by USAO Special Counsel Suttenberg, direct the Council to prior written responses[21] the CCRC has made to many of these concerns when they were previously raised during the creation of the recommendations.

Re Testimony of USAO Special Counsel Suttenberg:

- **Re USAO recommendation to disaggregate certain so-called "procedural" provisions that are "not integrally related to the substantive criminal law."** USAO testimony stated that "there are several provisions that are not integrally related to the substantive criminal law that the CCRC was tasked with revising" and recommends these "procedural provisions" be "disaggregated" from the bill and considered "if at all" at a later time "once the criminal justice system has responded to the RCCA's impacts."
    - *First, please note that the CCRC's statutory authorization under D.C. Code § 3–152 to develop code reform recommendations was not limited to "substantive criminal law" and instead refers broadly to "criminal statutes."* In addition to the statutorily-specified goals of proportionality, etc., D.C. Code § 3–152 explicitly authorizes submission of recommendations to "propose such other amendments as the Commission believes are necessary." The CCRC's prioritization of substantive criminal law provisions reflects a pragmatic agency decision based on the vast scope of District criminal statutes in need of reform, not the fact that the agency was "tasked" with only such substantive law provisions. All of the agency's recommendations, whether labeled "substantive" or "procedural" are fully within its statutory mandate.
    - *Second, the two RCCA provisions that USAO asked to be "disaggregated" because they are "procedural provisions" are essential considerations in whether penalties authorized in the RCCA are proportionate (one of the agency's explicit mandates in D.C. Code § 3–152)*.
        - The December 16th hearing discussion about the constitutional requirements of a right to a jury noted that crimes with penalties of more than 6 months convey a constitutional right of the defendant to demand a jury.[22] However, as recognized in the recent D.C. Court of Appeals case of *Bado v. United States,*[23] a crime carrying an imprisonment penalty of 6 months or less may also be jury demandable under the U.S. Constitution if the overall "penalty" for the conduct (e.g. deportation) is sufficiently great.[24] These constitutional holdings alone should be enough to understand how jury demandability is an essential part of any statutory changes to penalties in the RCCA.

- However, beyond this constitutional law connection, recent history demonstrates that jury demandability is central to legislative decisions about substantive law because it can profoundly distort charging practices by incentivizing the prosecution of lower charges that do not fully account for the facts of a case. Prosecutors enjoy wide discretion in charging decisions and the overlap between the scope of conduct covered by particular offenses (to a lesser degree under the RCC than the current D.C. Code) gives prosecutors multiple options as to which crimes to charge in a given case. If a prosecutor wishes to avoid a jury trial for any reason—and to the extent that added time is required for a jury trial or a conviction may be less likely,[25] a prosecutor may be incentivized to do so—the prosecutor often can simply opt to charge a non-jury demandable offense. The extent to which prosecutors make their charging decisions based on whether the crime is jury demandable is difficult to measure because charging discretion may be based on so many different reasons and there is no record as to the reason for choosing one charge over another.[26] Two examples of this are detailed further in the CCRC's legal commentary on the recommended statutory language: 1) the practice of USAO-DC attorneys charging non-jury demandable attempted threats (with a 180 day penalty) instead of a full, jury-demandable threats charge (with a 6 month penalty); and 2) the practice of USAO-DC attorneys charging non-jury demandable general assault charges (with a 180 day penalty) instead of a full, jury-demandable assault on a police officer (APO) charge (with a 6 month penalty).[27]
- Lastly, when the Council is determining new, proportionate penalties for the most serious crimes—crimes carrying decades-long sentences—it is critical that the Council consider whether there will be a judicial review mechanism to ensure that all those sentences continue to serve the interests of justice and public safety after a person in the distant future. As described further in the CCRC commentary,[28] this procedure (available to persons of any age at the time of their offense after they have completed at least 15 years of incarceration) has been recommended by the American Law Institute's (ALI)[29] Model Penal Code (MPC).[30] As the MPC Commentary states: "The provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition."[31]

- **Re USAO opposition to changing current law on jury demandability because it "will strain both court and prosecutorial resources."** Special Counsel Suttenberg stated that, besides disaggregating and postponing consideration of the RCCA's expansion of jury demandability because it is "procedural" in nature, the USAO-DC also opposes any expansion of jury access, stating: "Jury demandability requirements for misdemeanors [] should remain consistent with current law." In support of this position, Special Counsel Suttenberg said that: "Creating new rights to demand a jury in misdemeanor cases will strain both court and prosecutorial resources." Special Counsel Suttenberg said that "it

will likely take longer for misdemeanor cases to go to trial" and this "may result in delayed justice for victims, as victims will invariably need to wait longer for cases to resolve at trial, even in relatively straightforward misdemeanor cases." Further, Special Counsel Suttenberg said that: "[W]e would encourage the Council to seek testimony on this proposal from D.C. Superior Court."

- *First, as described in more detail in the CCRC Commentary on its jury demandability, the impact of the bill's expansion of jury demandability on prosecutorial and judicial resources is unclear not only because future crime rates and arrest rates are unknown, but because prosecutors themselves do not know how their charging and plea negotiations will change under the bill's reformed offenses.* The criminal justice system is not static. Any modeling of the impact of jury demandability expansion would have to make highly speculative assumptions not only about crime rates but arrest rates and prosecutorial charging and plea-bargaining patterns, which are highly discretionary matters that will be affected by the RCCA's new organization, description, and penalties for crimes. Notably, USAO itself has not provided an estimation of how its charging and plea negotiations of crimes would be affected by the RCCA even if the base crime rate and arrest rates were assumed. This lack of an estimation regarding changes to charging and plea bargaining is understandable given the lack of systematic review, even within most prosecution offices, of how such discretion is exercised. [32]
- *Second, while judicial vacancies and covid-related delays may cause a short-term challenge to judicial capacity, statistics show that, overall, the court has far greater capacity now than in prior decades.*
    - The crime rate in DC in 2020 was *less than one third* the crime rate in 1992 (990.22 vs 3154.6 per 100,00 residents). After the peak in 1992, crime rates have been gradually decreasing over the last 30 years.[33]
    - The number of cases filed with the Superior Court's Criminal Division is sharply lower in recent years. For example, according to the 2003 DC Courts Annual Report (the last available one on their website), 29,010 new cases were filed, 8,016 of which were felony cases. In 2019, 14,286 new cases were filed with 2,934 felony cases among them. This amounts to a *51% decrease* in new cases and a *63% decrease* in new felony cases in that 16-year span. Furthermore, in both 2003 and 2019, the Court was able to dispose of *more* cases than were filed that year (35,566 and 15,114 cases, respectively), efficiently tackling any backlog that could be created from reopened or reactivated cases.[34]
    - Of the 15,114 cases that were disposed in 2019, only 191 (1.3%) were via jury trial and 652 (4.3%) were via bench trial. In fact, since 2003, the highest percentage of cases going before a jury in a year was just 2.1% (2010). Likewise, the highest proportion of cases being disposed via bench trial was in 2015 when only 5.1% of the cases were tried by a judge. On average, between 2003 and 2019, *only 1.5% and 3.6%* of cases were disposed by jury or bench trial, respectively.[35]
    - Additionally, the number of associate judges serving on the Superior Court has modestly increased over this same time span. After the Court was established, Congressional Acts have added 7 (in 1984), then 8 (in 1990),

then 3 (in 2002) new associate judge seats to the Superior Court. Meaning, while caseloads and crime rates have gone down, the number of available judges has *increased*.[36]

- Lastly, while crime rates and case numbers have *decreased*, while jury and bench trials have *remained stable*, and while the number of judges has *increased*, the budget allotted to the Superior Court is *157%* of what it was in 2003. In 2020, the Court was allocated more than $125 million dollars. In comparison, it received approximately $80 million in 2003.[37] Even when taking into account inflation, the Court has an additional roughly $13 million with which to tackle a smaller workload than it had 17 years ago.[38]

- *Third,* to the extent that there may be delays in misdemeanor trials due to the greater number of jury trials as opposed to bench trials (as asserted by USAO), other changes to court processing may completely offset any delays in misdemeanor trials. Recent research by the National Center for State Courts shows that while jury trials nationally do, on average, take longer than bench trials, differences in courts' methods of case processing have a greater effect on the time a case takes.[39] The average national time for a bench trial is actually longer than the time for a jury trial in jurisdictions with the fastest case processing procedures.[40] The research suggests that following best practice court procedures may result in jury trials being as expeditious as bench trials that do not follow best practices.
- *Lastly*, *the DC Courts have been aware of the CCRC's work for years and its recommended statutory language since its release in early 2021.* The CCRC has had several communications with the current and former Superior Court Chief Judges, as well as most current and senior judges of the D.C. Court of Appeals about the recommendations in the RCCA. Over six months ago both Chief Judge Blackburne Rigsby and Chief Judge Josey-Herring received a full set of the CCRC's recommendations in April 2021 and I have subsequently presented an overview of the RCCA—including its jury demandability provisions—to a group including Superior Court Chief Judge Josey-Herring. There should be no inference that the DC Courts are unaware of the bill or this jury demandability provision, however they may or may not choose to address it.

- **Re USAO opposition to providing judges the power to defer dispositions for misdemeanors because there are no existing guidelines for implementation and may result in inconsistency with USAO guidelines.** Special Counsel Suttenberg stated that USAO has "a standardized system for identifying defendants who could benefit from diversion and then offering them the most appropriate diversion opportunity," but, "[b]y contrast, there have been no developed guidelines regarding the implementation of judicially led diversion." Special Counsel Suttenberg stated that, "[w]e want to ensure that our pre-trial diversion program is robust, allowing for the most appropriate plea agreement or diversion opportunity, and creating consistency between cases; this proposal may undermine our ability to accomplish that goal."
  - *First, detailed guidelines for judicial implementation of the deferral mechanism may not be suitable for statutory codification, but can be timely developed (if the judiciary so wishes) upon adoption of the legislation*. However, the lack of already-existing court guidelines, at most, a rationale for delaying implementation of the

RCCA a sufficient period of time to create such guidelines. The RCCA already provides a one-year delay until application (see section 501(a)) which appears to be sufficient to give opportunity for development of guidelines. If USAO were to share its internal guidelines, that might further speed the development of court guidelines.

- *Second, the RCCA creation of a judicial deferral mechanism for misdemeanors follows the recommendation of the recently updated Model Penal Code provisions on sentencing,[41] which specifically contrasts with procedures that require the approval of the prosecutor.* A judicial deferral mechanism that is entirely consistent with prosecutors' internal guidelines and goals would not reflect the need to vest dispositional authority in an independent judge who may differently the need for a conviction on record, with its attendant collateral and direct consequences. If judicial guidelines are developed, the Model Penal Code provisions may provide useful language to ensure consideration of victim and other perspectives during the process.

- **Re USAO recommendation to delay consideration of an expansion of a judicial review mechanism for long-term sentences until a review of a prior expansion is completed.** Special Counsel Suttenberg stated that, "Expanding the current IRAA to permit a universal second look would allow an additional 335 individuals in the custody of BOP who were 25 or older at the time of their offense and have served 15 years' incarceration to immediately move for release." Further, Special Counsel Suttenberg stated that, "Given that this pool of eligible individuals was so recently expanded, we encourage the Council to delay further consideration of any additional expansion. Before any additional expansion, we should review the impacts of this expansion…".
  - *An extensive record already exists of how the first IRAA legislation impacted individuals and public safety, including hearing testimony from individuals released under the IRAA legislation*. It is unclear if USAO has begun the review it describes or what length of time would address the USAO concern. As the effects of any release decision are ongoing, there is no apparent time at which an evaluation of IRAA legislation impact would be complete.

- **Re USAO opposition to lowering statutory penalties for first degree burglary and enhanced first degree burglary.**
  - *First, as defined in both the current D.C. Code and the RCCA, first degree burglary is a non-violent crime without any required proof of physical injury, threat, or damage—if violence (or theft of property or other crimes) occurs in the dwelling, those crimes can be separately charged and punished.* The gravamen of the burglary offense is an invasion of privacy and fear of a victim who (for first degree burglary) perceives a person in their dwelling. The RCCA burglary offense authorizes years of imprisonment for this harm, while also authorizing additional punishments for any predicate crimes that a person attempts or commits in the course of the burglary. Empirical research shows that violence of any kind in conjunction with a burglary is relatively rare,[42] and any such violence would merit a separate criminal charge beyond burglary. First degree burglary by a person with no prior felony convictions in the RCCA carries a 4-year maximum, or 8 years if

the person was at the time armed with a dangerous weapon.[43] An additional year (for a total of 9 years) is authorized if the person was so armed and had a prior felony conviction[44] (in addition to the years of imprisonment separately authorized for relevant weapon charges and conduct committed during the burglary). The RCCA seeks to authorize proportionate punishment for criminal behavior, including the most serious forms of that behavior, but the totality of punishment is not always reflected in one offense and the liability for behavior must be evaluated in light of all available charges.

- *Second, the RCCA's penalties for first degree and enhanced first degree burglary appear relatively low in comparison to current D.C. Code authorized penalties, sentencing guidelines, and current District court practices, but that is because the District currently is a national outlier in the severity of its statutorily authorized penalties and court-imposed sentences.* Currently the D.C. Code authorizes a 30 year imprisonment penalty for any entry into a dwelling with intent to commit any crime inside, and an *additional* 30 years[45] (for a total maximum of 60 years) if the burglar had on their person a dangerous weapon at the time. Those are effective life and near-life sentences[46] for a crime that requires no violence or intent to commit violence.
    - In sharp contrast, a recent Bureau of Justice Statistics (BJS) report provided to Advisory Group members during the CCRC's development of the recommendations in the RCCA, found that nationally, for burglary, 78.3% of state prisoners served less than 3 years, 91.5% of prisoners served less than 5 years, and 98.1% of prisoners served less than 10 years before release, when burglary was the most serious crime they committed.[47] These BJS statistics appear to include all forms of burglary, including enhanced forms of burglary due to prior convictions or presence of a weapon. The National Corrections Reporting Program (NCRP) data that are the basis of the BJS report further indicate that the percentage of inmates who served at least five years in prison for burglary was higher in DC than in 37 of the 43 other reporting states, and, conversely, the proportion of D.C. residents serving less than two years for a burglary charge was lower than that of 31 of the 43 other states. [48]
    - District sentencing practices likely reflect such a high punishment because nearly 99% of felony sentences in recent years are compliant with the District's Voluntary Sentencing Guidelines (VSGs),[49] and as USAO points out those guidelines set very high penalties for burglary. First degree burglary unarmed is to be punished the same under the District's VSGs as an assault with intent to kill another person, and an armed first degree burglary is to be punished the same as voluntary manslaughter while armed or first degree child sex abuse.[50] The VSGs may have set first degree burglary, a crime that requires no violence, with such extreme violent crimes because the statutory penalty is so high. Whatever the reason, however, because the VSGs punish first degree burglary so severely, District judges have followed suit.
- *Third, surveys of District voters support the RCCA penalties for burglary.* The CCRC conducted polling of 400 demographically-weighted District voters who, in

relevant part, were asked to compare the seriousness of behavior that would constitute first degree burglary or enhanced first degree burglary with various assault-type harms and death. The survey results, involving multiple questions, clearly demonstrate that while such burglaries may merit a low felony penalty, the seriousness is markedly less than an aggravated assault involving a serious bodily injury which is subject to a maximum initial sentence of 8 years (excluding backup time) under both current District law and the RCCA.[51] Critically, the polling questions asked for an assessment of a hypothetical individual's behavior as a whole, not "burglary" specifically, and there would be additional liability for other crimes under the RCC for any crime committed in the dwelling.

- **Re USAO opposition to lowering statutory penalties for carjacking and some degrees of robbery.**
    - *First, carjacking is treated as a form of robbery under the RCCA, consistent with the approach in the Model Penal Code and most other jurisdictions, as well as District practice before 1993.* Under current law, robbery and carjacking are separate offenses and a person can be charged and convicted of both for the same behavior. However, carjacking is essentially a robbery in which the property taken is a motor vehicle. There are two additional technical distinctions between robbery and carjacking. First, robbery requires "asportation," or carrying away of property, while carjacking does not. Second, carjacking only requires that the defendant "recklessly" takes a motor vehicle, whereas robbery requires that the defendant "knowingly" takes property. In practice however, virtually all carjacking cases are simply robberies in which a motor vehicle is taken. By including carjacking as a form of robbery, the revised robbery eliminates these distinctions. This approach is consistent with the Model Penal Code (MPC), which does not have a separate offense of carjacking, as well as 24 of the 29 jurisdictions surveyed by the CCRC on this issue.[52] Before the peak crime wave in the early 1990s and the passage of the District's carjacking statute in 1993, the District also treated carjacking as just a form of robbery or, where there was no threat or injury, simply theft.[53] Including carjacking in the revised robbery statute also requires that the defendant actually use force or threats to take the motor vehicle. The current carjacking statute includes taking a vehicle without force, by "stealthy seizure or snatching[.]" Under the current statute, carjacking includes sneaking into a running car and driving off while the owner is stopped at a gas station, even if no force or threats are used. By including carjacking in the revised robbery statute, this conduct of stealing without any threats of violence would constitute third degree theft instead of robbery.
    - *Second, the RCCA grades all forms of robbery according to the nature of the threat or physical injury involved—generally providing a robbery punishment that is one class more severe than if the injury had been inflicted in another context other than during a robbery.* At the low end, the RCCA third degree robbery statute authorizes up to 2 years (not including backup time) for a person who has no prior convictions for robberies or other felonies, was not armed, and did *not* inflict an injury requiring professional medical attention. That 2 year penalty (not including backup time) is equal to the current D.C. Code penalty for an unarmed assault that *does* require professional medical attention,[54] and the RCCA third degree assault offense for the

same harm and with the same penalty.[55] At the other end of the spectrum, the RCCA first degree robbery statute provides a 12 year penalty (not including backup time) for a person who has no prior convictions for robberies or other felonies, was not armed, and inflicts a serious bodily injury. That 12-year penalty (not including backup time) is nearly equal to the current D.C. Code maximum penalty for any unarmed robbery (13 years, excluding backup time),[56] and exceeds the current D.C. Code 8-year maximum penalty (not including backup time) for inflicting a serious bodily injury in other circumstances.[57]

- *Third, the USAO examples of robbery penalties committed with guns do not represent the total liability a person faces under the RCCA for use of a gun in conjunction with a robbery, because the examples do not mention the various other charges and penalties that such behavior entails.* The RCCA provides enhanced penalties if a dangerous weapon was used or displayed, with even greater penalties if the weapon caused an injury during the robbery, but the USAO appears to object particularly that these enhancements are insufficient when the weapon is brandished or fired at a person but does not cause injury. USAO stated that "under the RCCA proposal, both a defendant who held a gun to a victim's head and threatened to kill the victim in connection with a robbery and a defendant who fired a gun indiscriminately at a victim, but did not hit the victim because of bad aim, could each be sentenced to a maximum of 4 years' incarceration for that offense." In the example, there is a terrifying threat and grave danger, but no actual bodily harm inflicted. The example appears to be offered for why the RCCA penalty of 4 years for robbery that involves the display of a gun (but not use to injure) is inadequate. It is true that a 4 year robbery maximum penalty would apply to the example, assuming the person has no prior robbery or other felony convictions (which would increase the penalty to 5 years, excluding backup time). Most importantly, however, the USAO example fails to mention the various other charges under the RCCA that could be brought (and under current law frequently are brough) in conjunction with the robbery charge. These additional charges would raise the penalty for the behavior described by USAO to at least 6 years[58] (excluding backup time) for a person *without* a felony record and *without* discharging a firearm, and at least 20 years[59] (excluding backup time) for a person *without* a felony record and *with* discharging a firearm at the victim.
    - In fact, firing a gun at a person during a robbery and missing would constitute at least attempted second degree murder under the RCCA[60] and bring an additional 12 years of imprisonment liability (assuming still that the person had no prior felonies and excluding backup time).
    - If there was proof of premeditation and deliberation, which have no minimum of time and can be completed in a moment, the person would be liable for attempted first degree murder under the RCCA[61] and bring an additional 24 years of imprisonment liability.
    - Any discharge of a gun outside (even assuming, contrary to the hypothetical, that the robber was not aiming at the other person) is punishable under the RCCA as negligent discharge of a firearm,[62] with an an additional 1 year penalty.
    - The mere fact of carrying a firearm outside one's home to commit the

robbery is punishable under the RCCA as carrying a dangerous weapon[63] with an additional 2 or 4 years penalty depending on the location in D.C..

- If the person has a prior felony conviction for robbery or another violent offense, they will face an additional repeat offender enhancement (adding an additional one year and a charge under the RCCA for possession of a firearm by an unauthorized person[64] bearing an additional 2 or 4 years depending on the nature of the prior conviction.

- *Fourth, when the behavior described by USAO is analyzed for liability under the RCCA crimes generally, not just as a "robbery" crime, the total imprisonment liability under the RCCA exceeds the sentences actually given in over 90% of recent robbery convictions.* Recent D.C. Superior Court adult statistics for 2018 and 2019 analyzed by the CCRC[65] indicate that 50% of robbery sentences were for 3 years or less, 75% were for 4.5 years or less, 90% were for 5 years or less, and 95% were for 7 years or less. Those statistics were for all robberies, including those that inflict serious injuries, those committed while armed, and those in which a weapon was used. Comparing these numbers with the minimum liability under the RCCA for the behavior described by USAO—a minimum of 6 years for robbery[66] and carrying a dangerous weapon (CDW)[67] by a person with no prior felonies—suggests that the RCCA overall penalties may vary little from those in current D.C. Court practice.[68]
- *Fifth, surveys of District voters support the RCCA penalties for robbery (including carjacking-types of robbery).* The CCRC conducted polling of 400 demographically-weighted District voters who, in relevant part, were asked to compare the seriousness of behavior that would constitute armed robberies and takings of cars from another's possession with various assault-type harms and death. The survey results, involving multiple questions, clearly demonstrate that while such behavior may merit a low felony penalty when a gun is displayed but not used, the seriousness is markedly less than an aggravated assault involving a serious bodily injury which is subject to a maximum initial sentence of 8 years (excluding backup time) under both current District law and the RCCA.[69] Critically, the polling questions asked for an assessment of a hypothetical individual's behavior as a whole, not "robbery" or "carjacking" specifically, and there would be additional liability for other crimes under the RCC for any crime committed in the dwelling.
- *Sixth, while it is true that the District's Voluntary Sentencing Guidelines (VSGs) provide a slightly higher (3-6 year) range of sentences for a person convicted of armed robbery without a prior felony conviction than the 6+ year total penalty available under the RCCA for such behavior, the VSG penalties may reflect deference to the high statutory penalties under current District law.* Under current District law neither the current carjacking[70] nor the current robbery[71] statutes have any gradations, although there are enhancements for committing the offenses while armed with a club, knife, firearm, or other dangerous weapon.[72] Unarmed carjacking has a mandatory minimum of 7 years and a maximum of 21 years, armed carjacking has a mandatory minimum of 15 years and a maximum of 40 years. Unarmed robbery has a 15 year maximum and armed robbery a 45 year maximum. Combined, the current code thus provides for 7-36 years liability for any unarmed

taking of a car from the immediate possession another person. Those penalties apply even if there is no bodily injury or threat, and the victim needn't be removed from the car or threatened as long as they are nearby. If the offender was armed with a dangerous weapon when engaging in the conduct, those numbers rise to a combined liability of 15 to 85 years just under the robbery and carjacking statutes. To be clear, these penalties are authorized regardless of whatever other charges may be brought for conduct occurring during the taking. If a person is kidnapped—taken in the car any distance whatsoever—another 30 years is authorized. If a person is injured there are lengthy years authorized for assaults or, should a person be killed, murder. As discussed below, the fact that so many sentences are at the mandatory minimum is strong indication that District judges believe these mandatory minimums are not proportionate.

- **Re USAO opposition to the scope of the RCCA felony murder provisions.**
  - *First, the so-called "compromise position" of an affirmative defense for accomplices to felony murder that USAO proposed in its testimony does not reflect the CCRC recommendation.* In the USAO written testimony it was stated that "creating such an affirmative defense is consistent with a previous recommendation of the CCRC." However, the CCRC has issued no recommendations regarding felony murder besides those in the RCCA. An earlier *draft* of the murder statute considered by the CCRC and its Advisory Group did provide for an affirmative defense similar to that now proposed by USAO, but that draft was ultimately rejected and was not recommended to the Council or Mayor.
  - *Second, the continuation of felony murder as provided in the RCCA constitutes a "compromise position" as compared to the broad spectrum of expert support for complete elimination of felony murder liability and the multiple states that have eliminated felony murder liability.* As described by other Advisory Group members at the December 16th hearing on the RCCA, there is widespread support for elimination of felony murder among legal experts.[73] Several U.S. jurisdictions have no exception for felony murder in their murder statutes. Hawaii, Kentucky, and Michigan have abolished the felony murder rule entirely. Courts in three other states, Arkansas,[74] New Hampshire,[75] and New Mexico,[76] have interpreted felony murder to require that the defendant acted intentionally or with extreme indifference, effectively abolishing felony murder. Other states such as Illinois and California have also taken recent action to limit felony murder.
  - *Third, the RCCA felony murder rule fairly provides liability for homicides involving multiple perpetrators.* The USAO written statement says that, "Without some form of accomplice liability, crimes committed by multiple perpetrators would escape felony murder liability, while the same offense committed by a single perpetrator could result in felony murder liability." In the scenarios it provides, USAO repeatedly stated that where two (or more) people both engage in a felony (e.g., rape, child abuse, robbery) and the government cannot prove which of the two individuals engaged in the lethal act that killed the victim, "there may be no liability for murder." Unfortunately, it is true that the limited evidence discoverable by investigators can sometimes mean that there is not proof as to who committed a lethal act, and in that case no individual can be held liable for a completed murder.

But the inability of the government to be able to prove who actually killed a person does not mean that all murder liability is avoided or that a person cannot be held accountable by convictions for other major crimes. Other theories of liability exist for murder depending on the facts of the case—e.g., *attempted*[77] *murder* liability would exist where (one of the USAO examples) "two individuals fire gunshots at a victim at the same time in the course of an armed robbery or carjacking, and it is impossible to prove which bullet caused the victim's death." Any person who meets the general requirements of accomplice liability under the RCCA[78] can be held liable for the actions of another for murder under a non-felony murder theory. Even when the government lacks proof for homicide of any sort, rape, severe child abuse, and the other crimes referenced by USAO entail decades-long penalties. In the end, the question comes down to whether the label and higher penalties for murder should attach to a person who it cannot be proven actually killed the victim, actually attempted to murder the victim, actually was an accomplice to murder (under regular liability rules) or solicited another person to commit murder. It is tragic that in some cases it cannot be proven who committed a lethal act. However, this does not legitimize punishing someone for a killing that they did not commit and would not otherwise be held liable for were it any other crime.

- **Re USAO opposition to the RCCA providing an affirmative defense to sexual abuse of a child[79] where there was no force, the actor reasonably believed the child was 16 years or older based on an oral or written statement by the child to the actor, and in fact the child was at least 14.**
    - *First, the referenced affirmative defense to sexual abuse of a child[80] does not modify prohibitions on the admissibility of past sexual behavior (i.e., "rape shield" laws) under the current D.C. Code § 22-3021(a) or the corresponding RCCA 22A-2310.* The RCCA affirmative defense prevents liability where a person may reasonably believe an affirmative representation of a person who is in fact up to two years (but no more) younger than the legal age of consent. For example, a 15-year-old who shows a fake ID at a college party to a 20-year-old actor who then engages in a sexual contact or sexual act with the underage person, without force. The testimony by Special Counsel Suttenberg does not state that persons who fall within the defense should not be liable, but instead objects on grounds that the affirmative defense could allow questions or evidence in the case that are inappropriate. However, the affirmative defense does not modify the District's rape shield law which precludes evidence of past sexual behavior. Judges remain in control of ensuring that evidence of no probative value is not admitted. More detailed CCRC responses to USAO articulation of this evidentiary concern previously were submitted to the CCRC Advisory Group.[81]
    - *Second, the reasonable mistake of age affirmative defense in the RCCA is much narrower than the Model Penal Code's recently revised child sexual abuse requirement and other states' requirements, which say that the government must prove as an element that the actor was reckless as to the child's actual age.* Unlike the MPC[82] and several other states, the RCCA does not require the government to prove as an element of its case that the actor was reckless as to the age of the child. Consistent with current District law, the RCCA makes the age of the child a matter

of strict liability (the government need not prove the mental state as to age). However, the RCCA does provide the reasonable mistake of age affirmative defense, which the person accused of the crime must prove by a preponderance of evidence. The MPC commentary to the child sexual abuse offense states that "criminality, particularly in the case of offenses involving moral turpitude, always ought to depend on awareness of wrongdoing (a mens rea of at least recklessness) proved beyond a reasonable doubt, and as much so in sexual offenses as in any others."[83] The MPC commentary states: "[R]oughly 16 states allow for a mistake-of-age defense to at least a charge of statutory rape involving an older complainant; and three states permit the defense of reasonable mistake of age for any sexual offense involving a minor.[84]

- **Re USAO opposition to the RCCA defining a "sexual contact" and part of the definition of a "sexual act" to require proof that the contact or penetration (where it is by an object other than a penis) be "sexual" in nature.**
    - *First, the referenced RCCA definitions of "sexual act"[85] and "sexual contact"[86] do not decriminalize any conduct but do clearly restrict liability for non-sexual contacts with a person's breast, buttocks, genitals, or groin area or penetration by an object other than a penis through regular assault-type charges rather than sex crimes.* Subsections of the current D.C. Code definition of "sexual act" and the current definition of "sexual contact" both require an intent to "abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person,"[87] and as such appear to include conduct that may be non-sexual (though improper) from the viewpoints of all parties. There is an array of situations when a person may wrongfully make contact with parts of another's body that are *typically* touched by another only in a sexual manner but aren't sexual under the circumstances. Examples of such contacts may be pushing a person away by pushing their breast, spanking a child on their buttocks, or kicking a person in their genitals. Examples of such a penetration by an object may include a medical exam that did not receive prior consent to the penetration. To convict a person of a sex crime charge versus an assault or offensive physical contact charge, the RCCA requires the prosecution to prove that the actor's contact in question was committed with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire. Understandably, it may be difficult in some situations to prove whether a person's physical contact or act is meant to "abuse" or "harass" generally or whether the abuse or harassment is sexual in nature, but in such situations intent can be proven from the surrounding circumstances.[88]
    - *Second, the RCCA change to the definition of "sexual contact" follows well-established law in a majority of jurisdictions nationally as well as recent updates to the Model Penal Code sex crimes.* In the recently updated sexual assault provisions of the Model Penal Code (MPC) "sexual contact" is defined to be sexual in nature.[89] Supporting research in the MPC commentary shows that a large majority (31) of the 43 jurisdictions surveyed definitions of sexual contact also require the contact to be sexual in nature or purpose.[90]

- *Third, the RCCA change to the definition of "sexual act" has limited support by statutes in other jurisdictions and the recent updates to the Model Penal Code sex crimes.* In the recently updated sexual assault provisions of the Model Penal Code "sexual penetration" is defined to mean "an act involving penetration, however slight, of the anus or genitalia by an object or a body part, except when done for legitimate medical, hygienic, or law-enforcement purposes."[91] Supporting research in the MPC commentary shows that about 14 jurisdictions have similar exclusions to the MPC.[92] As described in the CCRC commentary,[93] the new language that is recommended was meant to similarly exclude such non-sexual situations as in the MPC definition and comparable jurisdictions. However, the specific formulation in the RCCA is not used elsewhere. The possibility of a nonconsensual, non-sexual penetration by another with an object is rare.[94] On the one hand this suggests that the government should have little difficulty proving that a penetration was not only done with a desire to degrade, humiliate, etc., but with desire to sexually degrade, humiliate, etc. On the other hand, the rarity may suggest that the limitation in the RCCA definition of a sexual act is unnecessary.

- **Re USAO stated opposition to elimination of mandatory minimum sentences.** Special Counsel Suttenberg stated during the hearing that the legislative position of USAO in favor of the continuation of many mandatory minimums under District law was consistent with statements by Attorney General Merrick Garland on ending mandatory minimums. In her testimony, Special Counsel Suttenberg stated in written testimony that, "While we recognize and agree with the desire to reduce the number of mandatory minimums, we cannot support eliminating them all, and argue that two in particular [the current 30-year mandatory minimum sentence for first degree murder and a 5-year mandatory minimum where: (1) the underlying offense is a crime of violence; and (2) the weapon involved was a firearm or imitation firearm] should remain in light of their direct relation to serious violent crime."
  - *First, the referenced statement of Attorney General Merrick Garland calling for the limitation of mandatory minimums was specifically in response to a question about equal justice for Black Americans and the tools that the Department of Justice would use to provide equal justice.* In relevant part, AG Garland stated: "And we should do as President Biden has suggested, seek the limitation of mandatory minimums so that we, once again, give authority to District judges trial judges to make determinations based on all the sentencing factors judges normally apply and don't take away from them the ability to do justice. All of that will make a big difference in the things you are talking about."[95] AG Garland also referred in his written responses to the Senate Judiciary Committee to the "elimination of mandatory minimums.[96] The intended scope of the AG's statement is ambiguous. While the immediate questions he was responding to and his statements were not limited in context, some of the more surrounding discussion was about mandatory minimums in the context of federal drug offenses specifically. Regardless, the rationale offered by AG Garland—allowing judges to exercise their regular discretion to sentence based on all the usual sentencing factors—applies to all other offenses as well.
  - *Second, statutorily authorized mandatory minimums are fundamentally*

inconsistent with individualized sentencing by judges who know the full circumstances of a particular case, circumstances which may be highly unusual and not contemplated by the legislature when creating a criminal penalty. As a general principle, the overall penalties provided in the RCCA seek to provide proportionate penalties for the convicted person's conduct, but this means that the penalties must accommodate both the most serious and least harmful circumstances under which the criminal conduct can be committed in unusual cases. Examples of these least-harmful circumstances may include a person who commits the crime while acting under coercion from a third party in a way that does not meet all criteria for a duress defense, a person previously victimized by the person who they attacked, an accomplice who encourages the person who actually completes the crime, or a person who commits the crime at the request of the victim. In these and other unusual circumstances, not normally contemplated by the law, a mandatory minimum sentence can prevent a judge from considering the unusual circumstances and result in an unjustly high sentence.

- *Third, the rationales offered by USAO for maintaining the mandatory minimum sentences for first degree murder and an enhancement for possessing a firearm or imitation firearm when committing a crime of violence—the seriousness of the offense and the unacceptability of the offense under the community's standards—would require a dramatic expansion of mandatory minimums beyond current law and include many non-violent offenses.* Simply put, if the seriousness of the offense generally (notwithstanding the specific circumstances in a given case) or the unacceptability of criminal behavior is assumed to justify mandatory minimums, then all felony offenses in the criminal code should carry mandatory minimums. Every felony offense is, by virtue of its imprisonment penalty, deemed a serious crime which the community finds unacceptable. The USAO rationales would include felony drug crimes and property crimes which are punishable by longer imprisonment times (both in the RCCA and in the current D.C. Code) than some crimes deemed "crimes of violence."[97] The USAO rationales for mandatory minimums, if adopted, would suggest that there should be a dramatic expansion of mandatory minimum sentencing in the District. In fact, the scattered mandatory minimum sentences in the D.C. Code reflect historical happenstance and there is no consistent or principled rationale for why mandatory minimums should exist for those offenses and not others. All mandatory minimum sentences should be eliminated for the reasons described in the RCCA day 1 and 2 hearings, the CCRC commentary to its recommendations,[98] and for the many reasons described by expert bodies calling for the categorical elimination of mandatory minimums such as the Judicial Conference of the United States,[99] the American Law Institute,[100] and the American Bar Association.[101]
- *Fourth, mandatory minimums are a primary driver of unnecessary incarceration and exacerbate the very problems of inconsistency and unfairness in sentencing that they purport to redress.* The commentary to the Model Penal Code's sentencing provisions (which recommend elimination of mandatory minimums) summarizes these points as follows:
  - "Since 1962, authorized mandatory minimums have proliferated in every American jurisdiction, and have contributed to the growth in the nation's

prison populations in the late 20th and early 21st centuries. Also during this time, concerns over the role of prosecutors in the sentencing process have greatly intensified—and there is no department of the criminal law more damaging to judicial sentencing discretion, or more egregious in its transfer of sentencing power to prosecutors, than the mandatory-minimum penalty. During the past several decades, accumulating knowledge has only strengthened the case that mandatory sentencing provisions do not further their purported objectives and work substantial harms on individuals, the criminal-justice system, and society. Empirical research and policy analyses have shown time and again that mandatory-minimum penalties fail to promote uniformity in punishment and instead exacerbate sentencing disparities, lead to disproportionate and even bizarre sanctions in individual cases, are ineffective measures for advancing deterrent and incapacitative objectives, distort the plea-bargaining process, shift sentencing authority from courts to prosecutors, result in pronounced geographic disparities due to uneven enforcement patterns in different prosecutors' offices, coerce some innocent defendants to plead guilty to lesser charges to avoid the threat of a mandatory term, undermine the rational ordering of graduated sentencing guidelines, penalize low-level and unsophisticated offenders more so than those in leadership roles, provoke nullification of the law by lawyers, judges, and jurors, and engender public perceptions in some communities that the criminal law lacks moral legitimacy."[102]

- *Fifth, CCRC surveys of District voters strongly indicate that the community does not think a person's possession of a firearm (let alone an imitation firearm) during a crime of violence necessarily categorically makes that crime much more serious—the use or display of a weapon and the resulting harms to the victim (whether or not a weapon is involved) often matter more.* CCRC Public Opinion Survey of District Voters[103] consistently shows that the involvement of a dangerous weapon (especially firearms) has an appreciable effect on the perceived severity of criminal conduct. However, District voters distinguished between mere possession and use of a weapon during the offense. Also, for use of a weapon during a crime the increase in severity was rated to be only slightly more serious than were the injury inflicted by another means—at least for felony level offenses.
- *Sixth, recent D.C. Superior Court statistics, as analyzed by the CCRC, suggest that judges frequently disagree with current mandatory minimums, including mandatory minimums for first degree murder and an enhancement for having a real or imitation firearm during a crime of violence.* If judges' sentencing decisions were not limited by existing mandatory minimum sentences, one would expect a graph of sentence length to have a gradual slope from a lowest sentence at 30 or more years to higher sentences. Instead, the distribution of sentences for offenses with mandatory minimums shows a high percentage (25% or more) at the mandatory minimum, followed by a gradual slope for higher sentences. Specifically, for the decade 2010-2019, 25-50% of adult first degree murder[104] sentences received the mandatory minimum of 30 years,[105] and 50-75% of persons convicted of possession of a firearm[106] while committing a crime of violence received the mandatory minimum of 5 years.[107] Current mandatory minimum

sentences for possession of a firearm while committing carjacking are even more clearly contrary to judicial decisions as to what is proportionate. Specifically, for the decade 2010-2019, 90-95% of adult armed carjacking[108] sentences received the mandatory minimum of 15 years.[109]

Re Testimony of Deputy Mayor for Public Safety and Justice (DMPSJ) Chris Geldart:

- In his opening statement, DMPSJ Geldart stated that, "This vast expansion of trials and hearings would strain both prosecutorial and court resources. It is the Executive's concern that this added workload on the courts will result in delayed justice for victims, as victims will need to wait longer for cases to resolve at trial. To give an idea of the potential magnitude of the shift, in 2019, only 11 out of over 600 misdemeanor trials were held before juries, where under the RCCA, approximately 300-400 of those trials would be eligible for juries."
    - Please see the above responses to the testimony of USAO Special Counsel Elana Suttenberg regarding the *relevant variables and uncertainty* of an increase in jury trials resulting from expanded access provided in the RCCA, as well as statistics on court capacity.
- In his opening statement, DMPSJ Geldart raised concern about what he referred to as the RCCA's replacement of the term "victim" with "complainant."
    - The RCCA continues to use the term "victim" in dozens of places where there is reference to a person whom it has been proven was harmed, and another review to ensure consistent use of that terminology would certainly be appropriate as the bill is considered further. However, the current D.C. Code does not use the word "victim" in offenses where the fact that a particular person was harmed has to be proven—instead, the current D.C. Code usually refers to "a person" or "another" as being the object of a crime. Similarly, the RCCA does not use the term "victim" when it must be proven (as part of an offense, penalty enhancement, defense, etc.) that another person was harmed. What the RCCA changes is that, instead of referring to the person who suffers an offense as a "person" or "another," the defined term "complainant" is typically substituted. In the RCCA the defined term "complainant"[110] "means a person who is alleged to have been subjected to the criminal offense." Conversely, the defined term "actor"[111] "means a person accused of a criminal offense." Consistent use of these terms allows the drafting of the code to avoid multiple confusing references to "persons" or "another" when the "person" could mean the accused, a victim, or a third party. These defined terms are intended to be neutral terms that concisely and clearly refer to relevant persons concerned without presuming that a crime was committed or unduly prejudicing proceedings. No change as to victim rights is intended or specified by the RCCA in conjunction with the use of this terminology. In the context of a particular case or trial, it is expected that the terminology "complainant" and "actor" may be dispensed with, as deemed appropriate by the judge, in favor of naming the particular person accused and/or the particular victim.
- A question arose during the hearing question period regarding participation of the designee of the DMPSJ to the CCRC Advisory Group's public meetings.
    - A review of CCRC records indicate that the Advisory Group held a total of 51 monthly meetings during its existence, from October 1, 2016 through March 24,

2021. Review of CCRC minutes indicates that DMPSJ Designee Helder Gil attended 1 meeting (the first meeting of the Advisory Group) on November 10, 2016. Mr. Gil did not attend further meetings. Beginning with a meeting on June 3, 2020, a DMPSJ Legislative Analyst called in to a total of 9 Advisory Group meetings in the remainder of 2020 and early 2021. No written comments on the CCRC draft work or final recommendations were received from DMPSJ.

[1] The American Law Institute is a longstanding national membership organization comprised of leading judges, legal scholars, and practitioners. In 2017, the ALI completed a multi-year review of model sentencing practices and issued new recommendations.

[2] American Law Institute, *Model Penal Code: Sentencing* at 157-158 (April 10, 2017), *available at* https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf ("The revised Code does not offer exact guidance on the maximum prison terms that should be attached to different grades of felony offenses. Instead, maximum authorized terms are stated in brackets. In part this is because the Code is agnostic as to the number of felony grades that should exist in a criminal code; see § 6.01(1) and Comments *a* through *c* (Tentative Draft No. 2, 2011). Maximum penalties necessarily will be arranged in finer increments if a code creates 10 levels of felony offenses, for instance, rather than five. Further, the revised Code for the most part draws short of recommendations concerning the severity of sanctions that ought to attend particular crimes. These are fundamental policy questions that must be confronted by responsible officials within each state. They are also questions with answers that change over time. The development of new rehabilitative treatment programs for an identifiable group of offenders, for example, may change the sentencing outcomes thought most appropriate for that group. Community values about discrete forms of criminality are also constantly evolving. Acquaintance rape and marital rape, as one illustration, are offenses regarded as much more serious today than 40 years ago. Some behaviors commonly criminalized in American codes in the mid-20th century, even at the felony level (and even in the original Model Penal Code), are no longer criminal offenses at all. The revised Code would impeach its own credibility were it to pretend Olympian knowledge of condign punishments. Instead, the Code confronts problems of prison-sentence severity through numerous other means, including the adoption of a sound institutional structure for the creation and application of rational sentencing policies, with a judiciary statutorily empowered at both the trial and appellate levels to combat disproportionality in punishment. On this subject, much weight is borne by other Sections of the Code. In the 1962 Code, the statutory ceilings in § 6.06 were the sole enforceable limitations upon sentence severity for the majority 1 of prison cases. Under the revised Code's sentencing system, severity is regulated primarily through sentencing guidelines, the courts' departure power under guidelines, meaningful appellate sentence review, and invigorated statutory mechanisms (beyond the historically weak constitutional protections under the Eighth Amendment) for subconstitutional proportionality review of excessively harsh penalties.").

[3] *See* D.C. Department of Health, *District of Columbia Community Health Needs Assessment, Volume 1* at 16 (March 15, 2013); Roberts, M., Reither, E.N. & Lim, S. *Contributors to the black-white life expectancy gap in Washington D.C.*, Sci Rep 10, 13416 (2020). Authorities vary on what imprisonment term constitutes a *de facto* life without release (LWOR) sentence, but recent case law from state high courts indicates that a term of 50 years is an effective LWOP sentence for *juvenile* offenders. *See People v. Contreras*, 4 Cal. 5th 349, 369, 411 P.3d 445, 455 (2018), as modified (Apr. 11, 2018) ("[O]ur conclusion that a sentence of 50 years to life is functionally equivalent to LWOP is consistent with the decisions of other state high courts.") Because adult offenders are older at the time of entry into incarceration, a *de facto* LWOR sentence for adults logically would be shorter than 50 years. In fact, the federal Bureau of Prisons (BOP) calculates persons incarcerated for a "life" sentence, including District persons in BOP custody, as serving a 470-month (39 years and two months) sentence based on their life expectancy. *See* United States Sentencing Commission, Sourcebook 2017, Appendix A, at S-166 ("[L]ife sentences are reported as 470 months, a length consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders.").

[4] Judicial Conference of the United States, *Letter to the U.S. Sentencing Commission dated July 31, 2017* (as approved by the Executive Committee, effective March 14, 2017), *available at* https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/CLC.pdf.

[5] American Law Institute, *Model Penal Code: Sentencing* at 149 (April 10, 2017), *available at* https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf.

[6] American Bar Association, House of Delegates Resolution 10B on Mandatory Minimums at 4 (2017).

[7] Transcript of U.S. Senate Judiciary Committee, Attorney General Confirmation Hearing, Day 1 at 3:48:12 (Feb. 22, 2021), *available at* https://www.c-span.org/video/?508877-1/attorney-general-confirmation-hearing-day-1 ("Senator Jon Ossoff: Thank you for your time. Thank you also for sharing your families immigrant story. It mirrors my own. My great- grandparents came fleeing anti-Semitism in 1911 in 1913 from Eastern Europe. I'm sure your ancestors

could hardly have imagined you would be sitting before this committee pending confirmation for this position. I want to ask you about equal justice. Black Americans continue to endure profiling, harassment, brutality, discrimination in policing and prosecution, sentencing and incarceration. how can you use the immense power of the also—of the Office of Attorney General to make real America's promise of equal justice for all? Can you please be specific about the tools you will have at your disposal?

Judge Garland: This is a substantial part of why I wanted to be the Attorney General. I'm deeply aware of the moment the country is in. When Senator Durbin was reading the statement of Robert Kennedy, it hit me that we are in a similar moment to the moment he was in. So, there are a lot of things the department can do and one of those things has to do with the problem of mass incarceration. The over incarceration of American citizens and its disproportionate effect on Black Americans and communities of color and other minorities. There are different ways—that is disproportion in the sense of both the population but also given the data we have on the fact that crimes are not committed by these communities in any greater number than in others and similar crimes are not charged in the same way. We have to figure out ways to deal with this.

One important way I think is to focus on the crimes that really matter, to bring our charging and arresting on violent crime and others that deeply affect our society. and not have such an overemphasis on marijuana possession, for example, which has disproportionately affected communities of color and damaged them far after the original arrest because of the inability to get jobs. We have to look at our charging policies again and go back to the policy I helped Janet Reno draft, Eric Holder drafted while he was Attorney General of not feeling we must charge every offense to the maximum, that we don't have to seek the highest possible offense with the highest possible sentence, that we should give discretion to our prosecutors to make the offense and the charge for the crime and to the damage it does to society.

That we should also look closely and be more sympathetic to retrospective reductions in sentences, which the first step act has given us some opportunity, though not enough to reduce sentences to a fair amount. Legislatively, we should look at equalizing, for example, what is known as the crack-powder ratio which has had an enormously disproportional impact on communities of color but which evidence shows is not related to the dangerousness of the two drugs. *And we should do as President Biden has suggested, seek the limitation of mandatory minimum so that we, once again, give authority to District judges trial judges to make determinations based on all the sentencing factors judges normally apply and don't take away from them the ability to do justice. All of that will make a big difference in the things you are talking about."*(emphasis added)) (text was compiled from uncorrected Closed Captioning); *see also* U.S. Senate Judiciary Committee, *Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General*, *available at* https://www.judiciary.senate.gov/imo/media/doc/QFR%20Responses%202-28.pdf.

[8] *See also* Michael Serota, *Second Looks & Criminal Legislation,* 17 OHIO ST. J. CRIM. L. 495, 519–22 (2020) (arguments in favor of second look procedural mechanisms from a retributive perspective).

[9] "National Capital Revitalization and Self-Government Improvement Act of 1997", Pub. L. No. 105-33, 111 Stat. 712 (1997) ("D.C. Revitalization Act"). The District of Columbia is one of only 16 American jurisdictions without a local parole opportunity of any kind. Other jurisdictions include: Arizona, Delaware, Florida, Illinois, Indiana, Kansas, Maine, Minnesota, New Mexico, North Carolina, Ohio, Oregon, Virginia, Washington, and Wisconsin. In addition, California has a parole system that is limited to life indeterminate life sentences. *See* Prison Policy Initiative, *Failure should not be an option: Grading the parole systems of all 50 states*, Appendix A, (2019), *available at* (https://www.prisonpolicy.org/reports/parole_grades_table.html).

[10] D.C. Code § 24-403.01 ("Notwithstanding any other law, a person sentenced to imprisonment, or to commitment pursuant to § 24-903, under this section for any offense may receive good time credit toward service of the sentence only as provided in 18 U.S.C. § 3624(b).").

[11] The District's mayor does have a limited power to pardon certain "offenses against the late corporation of Washington, the ordinances of Georgetown and the levy court, the laws enacted by the Legislative Assembly, and the police and building regulations of the District." D.C. Code § 1-301.76. However, the extent of mayoral power to pardon does not reach the overwhelming majority of District crimes. *See United States v. Cella*, 37 App. D.C. 433, 435 (1911) (stating "crimes committed [in the District of Columbia] are crimes against the United States"); U.S. Const. art. II, § 2, cl. 1 ("…he shall have Power to grant Reprieves and Pardons for Offenses against the United States").

[12] Model Penal Code: Sentencing §305.6 (Am. Law Inst., Proposed Final Draft, 2017) ("§ 305.6 is rooted in the belief that governments should be especially cautious in the use of their powers when imposing penalties that deprive offenders of their liberty for a substantial portion of their adult lives. The provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still. A second-look mechanism is meant to ensure that these sanctions remain intelligible and justifiable at a point in time far distant from their original imposition."). This draft was approved by the ALI membership at the 2017 Annual Meeting and represents the Institute's position until the official text is published.

[13] To date in 2021, there have been about 210 homicides, compared to:

2020	198	2015	162	2010	132	2005	196
2019	166	2014	105	2009	144	2004	198
2018	160	2013	104	2008	186	2003	248
2017	116	2012	88	2007	181	2002	262
2016	135	2011	108	2006	169	2001	232

Metropolitan Police Department, *District Crime at a Glance* (2021), https://mpdc.dc.gov/page/district-crime-data-glance.

[14] As of December 6, 2021, overall violent crime is only up 1% compared to 2020. Compared to 2019, violent crime decreased by 4% in 2020. *See* Metropolitan Police Department, *District Crime at a Glance* (2021), https://mpdc.dc.gov/page/district-crime-data-glance. Note that these MPD statistics do not include "unrest-related burglaries" and are slightly different than those included in FBI statistics for the District in 2020 cited in note 15.

[15] Annual violent crime rates per 100,000 residents

2020	990.22	2010	1233.92	2000	1507.22	1990	2874.57
2019	977.12	2009	1281.09	1999	1399.11	1989	2072.52
2018	942.63	2008	1402.02	1998	1515.07	1988	1889.66
2017	947.47	2007	1379.52	1997	1832.64	1987	1572.54
2016	1124.21	2006	1473.33	1996	2326.85	1986	1476.18
2015	1196.92	2005	1360.52	1995	2609.82	1985	1602.87
2014	1179.17	2004	1292.11	1994	2753.08		
2013	1211.23	2003	1554.79	1993	3137.44		
2012	1173.05	2002	1589.27	1992	3154.60		
2011	1126.98	2001	1599.99	1991	2812.48		

Federal Bureau of Investigation, *Crime Data Explorer* (2020), https://crime-data-explorer.fr.cloud.gov/pages/explorer/crime/crime-trend; U.S. Census Bureau, *Intercensal Data* (1980-2020), https://www.census.gov/quickfacts/DC (2020), https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-total.html (2010-2019), https://www.census.gov/data/tables/time-series/demo/popest/intercensal-2000-2010-state.html (2000-2009), https:// www.census.gov/data/tables/time-series/demo/popest/1990s-county.html (1990-1999), and https://www. census.gov/data/tables/time-series/demo/popest/1980s-county.html (1980-1989).

[16] *See* CCRC, Appendix G. Comparison of RCC Offense Penalties and District Charging and Conviction Data (available at https://ccrc.dc.gov/node/1531431).

[17] National Research Council, *The Growth of Incarceration in the United States: Exploring Causes and Consequences* at 345 (2014).

[18] James Austin, Todd Clear, and Richard Rosenfeld, *Explaining the Past and Projecting Future Crime Rates,* Harry Frank Guggenheim Foundation at 11-12 (Sept. 2020), *available at* https://www.hfg.org/wp-content/uploads/2021/06/pastandfuturecrimerates.pdf ("We now have clear evidence that lowering state and federal imprisonment rates will not necessarily trigger increases in crime. As shown in Table 3, there are several states where prison populations have been lowered by over 20% and crime rates have also declined by substantial amounts. Leading the imprisonment rate reductions are New Jersey (38% reduction) and New York (32% reduction). California has had the largest numeric drop in its prison population. By 2017 it had lowered its prison population by about 45,000. As of July 2019, its prison population had dropped below 125,000 and its probation, parole, and jail populations had also declined. In total, there were 225,000 fewer people in California's prison, jail, probation, and parole populations than in 2006, when a series of reforms took place. Maryland has had more modest declines in its prison population. Despite these declines, even larger decreases have occurred in each state's crime rate, with New Jersey and New York showing

decreases of over 40%. It is fair to say that no prior research on crime rates would have forecasted substantial declines in crime rates if imprisonment rates were sharply lowered.").

[19] CCRC analysis based in part on Superior Court data. *See* D.C. Crim. Code Reform Comm'n, Advisory Group Memorandum #40 and Appendices, *available at* https://ccrc.dc.gov/page/ccrc-documents (CCRC analysis of Superior Court criminal charge and disposition data for adults from January 1, 2009, through December 31, 2019) CCRC analysis also based in part on 2021 District-wide race and gender data provided by the D.C. Health Matters Collaborative. *See* www.dchealthmatters.org/demographicdata.

[20] Prison Policy Initiative, *District of Columbia profile* (2018), https://www.prisonpolicy.org/profiles/DC.html; Martin Austermuhle, "District Of Corrections: Does D.C. Really Have The Highest Incarceration Rate In The Country?" *WAMU* (blog), *available at* https://wamu.org/story/19/09/10/district-of-corrections-does-d-c-really-have-the-highest-incarceration-rate-in-the-country/ (last accessed October 30, 2020).

[21] See CCRC Appendix D. Disposition of Advisory Group Comments & Other Changes From Draft Documents.

[22] *Baldwin v. New York*, 399 U.S. 66, 74 (1970).

[23] *Bado v. United States*, 186 A.3d 1243, 1249 (D.C. 2018).

[24] *Blanton v. City of N. Las Vegas, Nev.*, 489 U.S. 538, 543 (1989) ("Although we did not hold in *Baldwin* that an offense carrying a maximum prison term of six months or less automatically qualifies as a "petty" offense,[7] and decline to do so today, we do find it appropriate to presume for purposes of the Sixth Amendment that society views such an offense as "petty." A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a "serious" one. This standard, albeit somewhat imprecise, should ensure the availability of a jury trial in the rare situation where a legislature packs an offense it deems "serious" with onerous penalties that nonetheless "do not puncture the 6–month incarceration line." Brief for Petitioners 16.[8]").

[25] Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("But while the Council's goal may have been efficiency, the effect on imprisonment rates was immediate and monumental. At the time, according to a report by the Court's executive officer, Superior Court judges were almost twice as likely as a jury to decide that someone was guilty—so reducing jury trials made the conviction rate skyrocket. For misdemeanors, the year prior to the MSA, only 46 percent of cases ended with a guilty verdict or a guilty plea. The year after, that number jumped to 64 percent. This wasn't exactly an unexpected consequence. Several councilmembers were sure to clarify that despite reducing criminal penalties, the MSA was tough on crime. Even though the maximum sentence for most of these crimes used to be one year, the actual sentence was already generally less than 180 days. Thus, explained Harold Brazil—then-Ward 6 councilmember and one of the Act's co-sponsors—the MSA would mean 'misdemeanants would actually do more time.' 'Crime in our society…[is] out of control,' Brazil argued at a Council hearing on April 12, 1994. 'Years and years of leniency and looking the other way and letting the criminal go has gotten us into this predicament.'").

[26] *But, see* Joshua Kaplan, *D.C. Laws Strip Thousands of Criminal Defendants of Their Right to a Jury Trial. One D.C. Judge Has Suggested That Should Change*, Washington City Paper (September 12, 2019) ("Reviewing more than 500 cases from 2019, City Paper found that over the course of one month, prosecutors dodged jury trials more than 24 times a week by taking a crime that is jury-demandable and charging it as another, counterintuitive crime that's not.").

[27] CCRC Commentary on Subtitles III-V, Statutes Outside Title 22, Statutes to Repeal at pgs. 464-466, available at https://ccrc.dc.gov/page/recommendations.

[28] CCRC Commentary on Subtitles III-V, Statutes Outside Title 22, Statutes to Repeal at pgs. 513-515, available at https://ccrc.dc.gov/page/recommendations.

[29] The American Law Institute is a longstanding national membership organization comprised of leading judges, legal scholars, and practitioners. In 2017, the ALI completed a multi-year review of model sentencing practices and issued new recommendations on second look procedures and other matters.

[30] Model Penal Code: Sentencing §305.6 (Am. Law Inst., Proposed Final Draft, 2017). This draft was approved by the ALI membership at the 2017 Annual Meeting, represents the Institute's position until the official text is published.

[31] Model Penal Code: Sentencing §305.6 cmt. a (Am. Law Inst., Proposed Final Draft 2017).

[32] Regarding the lack of standards or tracking systems in prosecutorial plea bargaining practices, *see, e.g.* Robin Olsen, Leigh Courtney, Chloe Warnberg, and Julie Samuels, *Prosecutorial Decisionmaking: Findings from 2018 National Survey of State Prosecutors' Offices* (Urban Institute, 2018) (survey of 158 state prosecutor's offices finding that many offices have an interest in collecting and using data, but it is "uncommon" to have any "systematic approaches for tracking compliance with office policies."); Garrett, Brandon L. and Crozier, William and Gifford, Elizabeth and Grodensky, Catherine and Quigley-McBride, Adele and Teitcher, Jennifer, *Open Prosecution (October 20, 2021) (available at http://dx.doi.org/10.2139/ssrn.3946415)* (describing the "black box" problem of plea negotiations and proposing a new, more transparent method).

[33] Annual violent crime rates per 100,000 residents

2020	990.22	2010	1233.92	2000	1507.22	1990	2874.57
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Federal Bureau of Investigation, *Crime Data Explorer* (2020), https://crime-data-explorer.fr.cloud.gov/pages/explorer/crime/crime-trend; U.S. Census Bureau, *Intercensal Data* (1980-2020), https://www.census.gov/quickfacts/DC (2020), https://www.census.gov/data/tables/time-series/demo/popest/2010s-national-total.html (2010-2019), https://www.census.gov/data/tables/time-series/demo/popest/intercensal-2000-2010-state.html (2000-2009), https://www.census.gov/data/tables/time-series/demo/popest/1990s-county.html (1990-1999), and https://www.census.gov/data/tables/time-series/demo/popest/1980s-county.html (1980-1989).

[34] DC Courts, *Annual Reports* (2003-2020), https://www.dccourts.gov/about/organizational-performance/annual-reports.

[35] *Id*.

[36] DC Judicial Nomination Commission, *FY 2017 Performance Plan* (2016), https://dccouncil.us/wp-content/uploads/2017/05/jps2.pdf.

[37] DC Courts, *Annual Reports* (2003-2020), https://www.dccourts.gov/about/organizational-performance/annual-reports. Calendar Year budgets were calculated by averaging the Superior Court budget appropriations from the two Fiscal Years that fall within the Calendar Year.

[38] According to an online calculator that uses up to date US government CPI data, $80 million dollars in 2003 would equate to approximately $112.5 million dollars in 2020. This is $13.2 million dollars below the amount allocated for the Superior Court in 2020. *Inflation Calculator* (2021), https://www.usinflationcalculator.com/.

[39] Brian Ostrom, Lydia Hamblin, and Richard Schauffler, *Delivering Timely Justice in Criminal Cases: A National Picture,* National Center for State Courts, (available at: https://www.ncsc.org/__data/assets/pdf_file/0017/53216/Delivering-Timely-Justice-in-Criminal-Cases-A-National-Picture.pdf).

[40] *Id.* at 7.

[41] Model Penal Code: Sentencing §6.02B cmt. d (Am. Law Inst., Proposed Final Draft 2017).

[42] Criminological research indicates that burglary is "overwhelmingly a non-violent offense." Phillip Kopp, *Is Burglary A Violent Crime? An Empirical Investigation Of Classifying Burglary As A Violent Felony And Its Statutory Implications* 119 (2014). In his 2014 report, Dr. Philip Kopp used data from the National Crime Victimization Survey (NCVS) and the National Incident Based Reporting System (NIBRS) to estimate rates of violence during burglaries. By drawing from the NCVS and NIBRS, he was able to assess both burglaries that were and were not reported to the police. Dr. Kopp found that "incidence of actual violence or threats of violence during a burglary ranged from a low of 0.9% in rural and suburban areas, to a high of 7.6% in highly urban areas." Furthermore, he found that a victim was only present in about a quarter of the analyzed burglaries. When a victim was present and interacted with the offender, less than half of the cases (2.7%) resulted in physical violence (as opposed to threats of violence). These low

rates of violence appear to be the result of burglars devoting substantial time and effort to avoiding encounters with their victims.
The Federal Sentencing Guidelines recently removed burglary as a listed offense in its definition of a violent crime. U.S. Sentencing Guidelines Amendment 798 (August 1, 2016) (amending the definition of "crime of violence in §4B1.2 to delete "burglary of a dwelling").
[43] RCCA § 22A-3801. Burglary.
[44] RCCA § 22A-606. Repeat offender penalty enhancement.
[45] D.C. Code § 22–4502.
[46] *See* D.C. Department of Health, *District of Columbia Community Health Needs Assessment, Volume 1* at 16 (March 15, 2013); Roberts, M., Reither, E.N. & Lim, S. *Contributors to the black-white life expectancy gap in Washington D.C.*, Sci Rep 10, 13416 (2020). Authorities vary on what imprisonment term constitutes a *de facto* life without release (LWOR) sentence, but recent case law from state high courts indicates that a term of 50 years is an effective LWOP sentence for *juvenile* offenders. *See People v. Contreras*, 4 Cal. 5th 349, 369, 411 P.3d 445, 455 (2018), as modified (Apr. 11, 2018) ("[O]ur conclusion that a sentence of 50 years to life is functionally equivalent to LWOP is consistent with the decisions of other state high courts.") Because adult offenders are older at the time of entry into incarceration, a *de facto* LWOR sentence for adults logically would be shorter than 50 years. In fact, the federal Bureau of Prisons (BOP) calculates persons incarcerated for a "life" sentence, including District persons in BOP custody, as serving a 470-month (39 years and two months) sentence based on their life expectancy. *See* United States Sentencing Commission, Sourcebook 2017, Appendix A, at S-166 ("[L]ife sentences are reported as 470 months, a length consistent with the average life expectancy of federal criminal offenders given the average age of federal offenders.").
[47] U.S. Department of Justice Bureau of Justice Statistics, *Time Served in State Prison, 2016*, November 2018.
[48] CCRC recently contacted BJS and obtained access to the underlying data. These percentages are based on CCRC analysis of the NCRP data.
[49] D.C. Sentencing Commission, *2020 Annual Report,* at ii.
[50] D.C. Sentencing Commission, *2020 Voluntary Sentencing Guidelines Manual,* at A-1.
[51] See the responses to survey questions in Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses). Question 3.27 provided the scenario: "Entering an occupied home intending to steal property while armed with a gun. When confronted by an occupant, the person displays the gun, then flees without causing an injury or stealing anything." Question 3.27 had a mean response of 6.8, less than one class above the 6.0 milestone corresponding to felony assault, currently a 2 year offense (excluding backup time) in the D.C. Code and the same in the RCCA. Question 1.07 provided the scenario: "Entering an occupied home intending to steal property, and causing minor injury to the occupant before fleeing. Nothing is stolen." Question 1.07 had a mean response of 6.1, just barely above the 6.0 milestone corresponding to felony assault, currently a 2 year offense (excluding backup time) in the D.C. Code and the same in the RCCA. Question 1.08 "Entering an occupied home with intent to cause a serious injury to an occupant, and inflicting such an injury." Question 1.08 had a mean response of 8.5, just a half-class above the 8.0 milestone corresponding to aggravated assault (causing a serious injury), currently a 8 year offense (excluding backup time) in the D.C. Code and the same in the RCCA.
[52] CCRC Appendix J. Research on Other Jurisdictions' Relevant Criminal Code Provisions at 380.
[53] *See* https://mpdc.dc.gov/page/carjacking ("Up until 1993, carjacking was reported as either armed robbery or auto theft in the District of Columbia. In response to several highly-publicized incidents, the D.C. Council passed laws providing stiffer penalties for individuals arrested and convicted of carjacking. It is critical that victims report these crimes to the police.").
[54] D.C. Code § 22-404(a)(2).
[55] RCCA 22A-2202(c).
[56] D.C. Code § 22-2801.
[57] D.C. Code § 22-404.01.
[58] Including an additional 2 years for carrying a dangerous weapon under RCCA 22A-5104.
[59] Including an additional 2 years for carrying a dangerous weapon under RCCA 22A-5104 and an additional 12 years for attempted second degree murder under RCCA 22A-2102.
[60] RCCA 22A-2102.

[61] RCCA 22A-2102.
[62] RCCA 22A-5108.
[63] RCCA 22A-5104.
[64] RCCA 22A-5107.
[65] CCRC analysis based on Superior Court data. *See* D.C. Crim. Code Reform Comm'n, Advisory Group Memorandum #40 and Appendices, *available at* https://ccrc.dc.gov/page/ccrc-documents (the CCRC analysis does not provide a more specific percentage of sentences at the mandatory minimum).
[66] RCCA 22A-2201.
[67] RCCA 22A-5104.
[68] Unfortunately, accurate data on concurrent and consecutive sentencing for CDW and robbery is not available to provide a more apples-to-apples comparison.
[69] See the responses to survey questions in Advisory Group Memo #27 (Public Opinion Surveys on Ordinal Ranking of Offenses). Question 2.08 provided the scenario: "Robbing a store cashier of $50 cash by displaying a gun." Question 2.08 had a mean response of 5.4, less than one class above the 6.0 milestone corresponding to felony assault, currently a 2 year offense (excluding backup time) in the D.C. Code and the same in the RCCA. Question 1.15 provided the scenario: "Displaying a gun to get the only person in a car out, causing no injury, then stealing it." Question 1.15 had a mean response of 6.1, just barely above the 6.0 milestone corresponding to felony assault, currently a 2 year offense (excluding backup time) in the D.C. Code and the same in the RCCA. Question 1.16 provided the scenario "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun.." Question 1.16 had a mean response of 6.2 just barely above the 6.0 milestone corresponding to felony assault, currently a 2 year offense (excluding backup time) in the D.C. Code and the same in the RCCA. Question 1.17 provided the scenario "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." Question 1.17 had a mean response of 7, exactly half-way between the 6.0 milestone corresponding to felony assault (currently a 2 year offense, excluding backup time, in the D.C. Code and the same in the RCCA) and the 8.0 milestone corresponding to aggravated assault (causing a serious injury), (currently a 8 year offense, excluding backup time, in the D.C. Code and the same in the RCCA).
[70] D.C. Code § 22–2803.
[71] D.C. Code § 22–2801.
[72] D.C. Code § 22–4502.
[73] *See, e.g.,* Guyora Binder, *Making the Best of Felony Murder*, 91 B.U. L. Rev. 403, 404 (2011) (Noting that the felony murder rule is "one of the most widely criticized features of American criminal law"). *See also* .g., Michael J. Roman, *"Once More Unto the Breach, Dear Friends, Once More": A Call to Re-Evaluate the Felony-Murder Doctrine in Wisconsin in the Wake of State v. Oimen Andstate v. Rivera*, 77 Marq. L. Rev. 785, 827 (1994); Sanford H. Kadish, *Foreword: The Criminal Law and the Luck of the Draw*, 84 J. Crim. L. & Criminology 679, 696 (1994).
[74] Ark. Code Ann. § 5-10-102.
[75] N.H. Rev. Stat. Ann. § 630:1-a. First degree murder includes *knowingly* causing death of another while committing or attempting to commit sexual assault, robbery or burglary while armed when the death is caused by the weapon, or arson. Second degree murder does not explicitly include accidental homicide during the course of a felony. However, second degree murder includes causing death "recklessly under circumstances manifesting an extreme indifference to the value of human life" and the statute includes a presumption of such recklessness if "actor causes the death by the use of a deadly weapon in the commission of, or in an attempt to commit, or in immediate flight after committing or attempting to commit any class A felony." N.H. Rev. Stat. Ann. § 630:1-b.
[76] *State v. Ortega*, 817 P.2d 1196, 1204 (N.M. 1991) (holding that New Mexico's felony murder statute require "proof that the defendant intended to kill").
[77] RCCA 22A-301.
[78] RCCA 22A-210.
[79] RCCA 22A-2302.
[80] RCCA 22A-2302.
[81] See CCRC Appendix D. Disposition of Advisory Group Comments & Other Changes From Draft Documents, pgs. 165-167.

[82]American Law Institute, Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 5 (May 4, 2021) § 213.8. Tentative Draft No. 5 was approved at the 2021 ALI Annual Meeting. https://www.ali.org/projects/show/sexual-assault-and-related-offenses/#_status.

[83] American Law Institute, Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 5 (May 4, 2021) at 333. Tentative Draft No. 5 was approved at the 2021 ALI Annual Meeting. https://www.ali.org/projects/show/sexual-assault-and-related-offenses/#_status.

[84] American Law Institute, Model Penal Code: Sexual Assault and Related Offenses, Tentative Draft No. 5 (May 4, 2021) at 403. Tentative Draft No. 5 was approved at the 2021 ALI Annual Meeting. https://www.ali.org/projects/show/sexual-assault-and-related-offenses/#_status.

[85] RCCA 22A-101(118) (""Sexual act" means: (A) Penetration, however slight, of the anus or vulva of any person by a penis; (B) Contact between the mouth of any person and another person's penis, vulva, or anus; (C) Penetration, however slight, of the anus or vulva of any person by any body part or by any object, with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire;" or (D) Conduct described in subparagraphs (A)-(C) of this paragraph between a person and an animal.").

[86]RCCA 22A-101(119) (""Sexual contact" means: (A) Sexual act; or (B) Touching of the clothed or unclothed genitalia, anus, groin, breast, inner thigh, or buttocks of any person: (i) With any clothed or unclothed body part or any object, either directly or through the clothing; and (ii) With the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire.").

[87] D.C. Code § 22-3001(8)(C), (9). (""Sexual act" means: (A) The penetration, however slight, of the anus or vulva of another by a penis; (B) Contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus; or (C) The penetration, however slight, of the anus or vulva by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person. (D) The emission of semen is not required for the purposes of subparagraphs (A)-(C) of this paragraph. (9) "Sexual contact" means the touching with any clothed or unclothed body part or any object, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person.").

[88] These difficulties were well understood by the American Law Institute reporters and assembled experts, but still the recently updated Model Penal Code sexual assault provisions require a contact to be "sexual" in nature, as in the RCCA. *See* Model Penal Code: Sexual Assault and Related Offenses, 213.0 (Am. Law Inst., Tentative Draft 5, May 4, 2021) at 76 ("Of course, in cases involving contact with intimate parts, it is often difficult to distinguish sexual humiliation or degradation from humiliation or degradation that lacks a sexual dimension. Consider, for example, a person who, as part of a fraternity hazing ritual, spanks the buttocks of a pledge. Or consider a case in which a correctional officer intending to retaliate against a belligerent inmate deliberately spills a bucket of urine on the inmate, soaking the inmate's groin. Does the actor's motivation involve sexual humiliation or just humiliation, plain and simple? Although such cases raise difficult questions, they may be resolved with reference to added facts that indicate whether the actor's purpose was at least partly sexual in nature, such as whether the actor made sexually suggestive comments or insults during the act, whether the context of a relationship suggests a sexual motivation, and whether the contact with the intimate area was fundamental to the actor's intention in engaging in the contact. A coach who affectionately slaps the buttocks of players as they leave the field is unlikely to have a sexually motivated purpose at all. A coach who slaps the buttocks of only one player, given additional evidence that the coach also makes sexual comments while doing so and refers to that player by name or gesture while using a derogatory anti-gay slur, may be found to be acting with a sexual purpose. As is often the case with regard to mens rea requirements, the particular context and circumstances of the act will determine the sufficiency of the evidence.").

[89] Model Penal Code: Sexual Assault and Related Offenses, 213.0 (Am. Law Inst., Council Draft 10, December 2021). ("Sexual contact" means any of the following acts, *when the actor's purpose is the sexual arousal, sexual gratification, sexual humiliation, or sexual degradation of any person*: (i) touching the clothed or unclothed genitalia, anus, groin, breast, buttocks, or inner thigh of any person with any body part or object; or (ii) touching any body part of any person with the clothed or unclothed genitalia, anus, groin, breast, buttocks, or inner thigh of any person; or (iii) touching any clothed or unclothed body part of any person with the ejaculate of any person. The touching described in paragraph (c) includes the actor touching another person, another person touching the actor or a third party, or another person touching that person's own body. It does not include the actor touching the actor's own body." (emphasis added)).

[90] Model Penal Code: Sexual Assault and Related Offenses, 213.0 (Am. Law Inst., Council Draft 5, December 2021) at 67-68
[91] Model Penal Code: Sexual Assault and Related Offenses, 213.0 (Am. Law Inst., Council Draft 10, December 2021).
[92] Model Penal Code: Sexual Assault and Related Offenses, 213.0 (Am. Law Inst., Preliminary Draft 4, October 3, 2014) at 28.
[93] CCRC Commentary on Subtitle I at pg. 612, available at https://ccrc.dc.gov/page/recommendations. ("The requirement in subparagraph (C) [of the definition of sexual act] that the penetration be done with "the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of a person with such a desire," excludes penetration done for legitimate medical, hygienic, or law-enforcement reasons.").
[94] It is difficult to imagine a sorority or fraternity hazing involving a penetration that is *not* meant to be sexually abusive, humiliating, harassing, degrading, arousing, or gratifying to any person. USAO Special Counsel Suttenberg stated in her testimony: "When committing a sexual offense, a defendant may be motivated by a desire to be violent or to assert power over a victim, not necessarily to be sexually aroused. For example, if, at a fraternity or sorority hazing, a defendant publicly penetrated another person with an object, the defendant may not have been acting with a sexual desire, but may have been acting with an intent to abuse, humiliate, harass, or degrade the victim." However, the example does not appear to accurately describe the RCCA definition. The RCCA 22A-101(118) definition of a sexual act does not require a person to be "sexually aroused" or act with "sexual desire" as described in the USAO example—the definition in relevant part requires penetration "by any object, with the desire to sexually abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire."
[95] Transcript of U.S. Senate Judiciary Committee, Attorney General Confirmation Hearing, Day 1 (Feb. 22, 2021) at 3:48:12 (available at https://www.c-span.org/video/?508877-1/attorney-general-confirmation-hearing-day-1&live=) ("Senator Ossoff: Thank you for your time. Thank you also for sharing your families immigrant story. It mirrors my own. My great friend parents came fleeing anti-Semitism in 1911 in 1913 from Eastern Europe. I'm sure your ancestors could hardly have imagined you would be sitting before this committee pending confirmation for this position. I want to ask you about equal justice. Black Americans continue to endure profiling, harassment, brutality, discrimination in policing and prosecution, sentencing and incarceration. how can you use the immense power of the also -- of the Office of Attorney General to make real America's promise of equal justice for all? Can you please be specific about the tools you will have at your disposal?
Judge Garland: This is a substantial part of why I wanted to be the Attorney General. I'm deeply aware of the moment the country is in. When Senator Durbin was reading the statement of Robert Kennedy, it hit me that we are in a similar moment to the moment he was in. So there are a lot of things the department can do and one of those things has to do with the problem of mass incarceration. The over incarceration of American citizens and its disproportionate effect on Black Americans and communities of color and other minorities. There are different ways -- that is disproportion in the sense of both the population but also given the data we have on the fact that crimes are not committed by these communities in any greater number than in others and similar crimes are not charged in the same way. We have to figure out ways to deal with this.
One important way I think is to focus on the crimes that really matter, to bring our charging and arresting on violent crime and others that deeply affect our society. and not have such an overemphasis on marijuana possession, for example, which has disproportionately affected communities of color and damaged them far after the original arrest because of the inability to get jobs. We have to look at our charging policies again and go back to the policy I helped Janet Reno draft, Eric Holder drafted while he was Attorney General of not feeling we must charge every offense to the maximum, that we don't have to seek the highest possible offense with the highest possible sentence, that we should give discretion to our prosecutors to make the offense and the charge for the crime and to the damage it does to society.
That we should also look closely and be more sympathetic to retrospective reductions in sentences, which the first step act has given us some opportunity, though not enough to reduce sentences to a fair amount. Legislatively, we should look at equalizing, for example, what is known as the crack-powder ratio which has had an enormously disproportional impact on communities of color but which evidence shows is not related to the dangerousness of the two drugs. *And we should do as President Biden has suggested, seek the limitation of mandatory minimum so that we, once again, give authority to District judges trial judges to make determinations based on all the sentencing factors*

judges normally apply and don't take away from them the ability to do justice. All of that will make a big difference in the things you are talking about." (text was compiled from uncorrected Closed Captioning) (emphasis added).).

[96] U.S. Senate Judiciary Committee, Attorney General Confirmation Hearing, *Responses to Questions for the Record to Judge Merrick Garland, Nominee to be United States Attorney General,* at 132-133, *available at* https://www.judiciary.senate.gov/imo/media/doc/QFR%20Responses%202-28.pdf. ("62. If you are confirmed as Attorney General and Congress chooses not to heed your call to eliminate mandatory minimum sentences, do you believe that you have the authority to unilaterally override Congress by categorically declining to bring charges that would trigger those sentences? RESPONSE: As I testified at my hearing, I support the policy I helped draft for Attorney General Reno, and that was furthered by Attorney General Holder in which prosecutors are not required to seek in every case the most serious offense with the highest possible sentence. I believe that we should give discretion to our prosecutors to make the charge fit the crime and be proportional to the damage that it does to our society. *In addition, as President Biden has suggested, we should consider the elimination of mandatory minimums so that we, once again, give authority to trial judges to make determinations based on all of the sentencing factors that judges normally apply. This would give judges the ability to do justice in individual case.*").

[97] *E.g.* assault with significant bodily injury (D.C. Code § 22-404(a)(2); RCCA 22A-22029(c)).

[98] CCRC Commentary on Subtitle I at pgs. 393-395, available at https://ccrc.dc.gov/page/recommendations.

[99] Judicial Conference of the United States *Letter to the U.S. Sentencing Commission dated July 31, 2017* (as approved by the Executive Committee, effective March 14, 2017) ("The Commission is well aware of the Judicial Conference's longstanding position opposing mandatory minimum penalties and its support of legislative efforts such as expansion of the "safety valve" at 18 U.S.C. 3553(f). Mandatory minimum sentences waste valuable taxpayer dollars, create tremendous injustice in sentencing, undermine guideline sentencing, and ultimately foster a lack of confidence in the criminal justice system. For over sixty years, the Judicial Conference has consistently and vigorously opposed mandatory minimum sentencing provisions and has supported measures for their repeal or to ameliorate their effects. The Judicial Conference also supports the Commission in its work in pursuit of an amendment to 18 U.S.C. § 924(c) to preclude the stacking of counts and make clear that additional penalties apply only when, prior to the commission of such offense, one or more convictions of such person have become final.") (https://www.ussc.gov/sites/default/files/pdf/amendment-process/public-comment/20170731/CLC.pdf).

[100] American Law Institute, *Model Penal Code: Sentencing* (April 10, 2017) at 166 ("Even if it were a desirable policy in the abstract, legislatively mandated sentencing uniformity has never been achieved in practice. Studies of the operation of mandatory-minimum penalties show that they are not enforced by prosecutors in all eligible cases. Selective charging and the plea-bargaining process lead to uneven application of the seemingly flat penalties. Evidence suggests that racial and ethnic biases sometimes influence the application of mandatory-minimum statutes. In addition, mandatory sentencing laws tend to be applied differently in different locales within a single state. Empirical, theoretical, and anecdotal accounts all support the conclusion that the attempt to eliminate judicial sentencing authority through mandatory-penalty provisions does not promote consistency, but merely shifts the power to individualize punishments from courts to prosecutors.").

[101] ABA House of Delegates, Resolution 10B on Mandatory Minimums (2017), at 4. ("RESOLVED, That the American Bar Association opposes the imposition of a mandatory minimum sentence; and FURTHER RESOLVED, That the American Bar Association urges Congress, state and territorial legislatures to repeal existing criminal laws requiring minimum sentences, and to refrain from enacting laws punishable by mandatory minimum sentences.").

[102] American Law Institute, *Model Penal Code: Sentencing* (April 10, 2017) at 149.

[103] *See* Advisory Group Memo #27 - Public Opinion Surveys on Ordinal Ranking of Offenses available at https://ccrc.dc.gov/page/ccrc-documents.

[104] D.C. Code § 22-2101.

[105] CCRC analysis based on Superior Court data. *See* D.C. Crim. Code Reform Comm'n, Advisory Group Memorandum #40 and Appendices, *available at* https://ccrc.dc.gov/page/ccrc-documents (the CCRC analysis does not provide a more specific percentage of sentences at the mandatory minimum).

[106] D.C. Code § 22-4504(b)

[107] CCRC analysis based on Superior Court data. *See* D.C. Crim. Code Reform Comm'n, Advisory Group Memorandum #40 and Appendices, *available at* https://ccrc.dc.gov/page/ccrc-documents (the CCRC analysis does not provide a more specific percentage of sentences at the mandatory minimum).

[108] D.C. Code § 22-2803(b)(1).
[109] CCRC analysis based on Superior Court data. *See* D.C. Crim. Code Reform Comm'n, Advisory Group Memorandum #40 and Appendices, *available at* https://ccrc.dc.gov/page/ccrc-documents (the CCRC analysis does not provide a more specific percentage of sentences at the mandatory minimum).
[110] RCCA 22A-101(21).
[111] RCCA 22A-101(2).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
Executive Office of Mayor Muriel Bowser

Public Hearing
on

B24-416, the "Revised Criminal Code Act of 2021"

Testimony of
Chris Geldart
Deputy Mayor for Public Safety & Justice

Before the
Committee on the Judiciary & Public Safety
The Honorable Charles Allen, Chairperson

December 16, 2021
Virtual Hearing
Washington, DC 20004
9:30

Good morning Chairpersons Allen, members, and staff of the Committee on the Judiciary and Public Safety. I am Chris Geldart, Deputy Mayor for Public Safety and Justice. I am here today to provide the Executive testimony on the Bill 24-416: the Revised Criminal Code Amendment Act of 2021, or "RCCA."

I want to thank Director Schmechel and his staff for their thoughtful work over 4.5 years to develop its recommendations. We appreciate the need for a comprehensive update to our criminal code, which has not undergone such an update since 1901. However, I want to raise two significant Executive concerns that we believe should be addressed prior to implementation of the breadth of systemic changes proposed by the RCCA.

1. <u>The Need for the Opportunity for Meaningful Participation by Residents</u>

The Mayor has stated that the most persistent and pressing issue that we face as a government is ensuring the safety of the residents we serve. Given the significant impact of our decisions on our residents, it is important that we center them and their safety in every action that we take, and must be guided by our responsibility to advance public safety. The best way for us to ensure that our residents' safety is a primary consideration is by allowing them a meaningful opportunity to make their voices heard. Legislation such as the RCCA that will greatly impact the community needs to be considered in a manner that ensures that nothing happens to community without the community.

To do this, we believe that conversations that take place in the community educating the residents on the proposed changes and its impact should be a part of this process. It is the Executive's priority to ensure that residents feel safe. Prior to passing massive criminal justice reforms that will have both significant intended and unintended impacts on resident safety, it is imperative to educate and communicate with residents, to hear their questions and concerns, and to ensure whatever balance is selected between criminal sentencing of offenders and neighborhood safety is reflective of the residents of the District.

Currently, the majority of residents are not aware of the changes proposed by the RCCA and its impact on their community. We respect the efforts that have been made by the CCRC to allow for transparency and public participation; that process has resulted in approximately 500 residents

being heard. We also recognize that the Council has engaged the public by conducting 3 hearings resulting in testimony by Director Schmechel, 25 representatives from selected organizations in the District and 25 members of the public, including ONE ANC commissioner.

We recognize that all 705,000 District residents, that will be affected by the changes in the bill and by its impact on our agencies' ability to preserve public safety in their communities, will not be able to participate. However, we still believe a process as thoughtful as the one that resulted in the creation of the bill should allow for as much thoughtful consideration, and meaningful participation, as possible from more of the residents who will be impacted.

To better reach the residents impacted by the legislation, the Committee could use platforms like neighborhood ANC meetings, Council roundtables in each of the wards, and community office hours, to educate the residents about some of the major reforms contained within the RCCA. By proactively engaging the community about the reforms, the Council will ensure the balance between public safety and proportionality, accurately reflects the thoughts, feelings and needs of the District's diverse communities.

2. <u>The Need for the Opportunity for Meaningful Participation by Implementing Entities</u>

While the Executive is generally supportive of the RCCA, we are concerned with the speed the Council appears to be moving on the RCCA. Given the thoughtful process that was undertaken by the CCRC to arrive at the proposed changes, it seems wise to employ an equally thoughtful process in evaluating the impact of the bill and in allowing for a collaborative process for creating an implementation strategy that will not upend the fragile public safety and justice ecosystem. As I previously stated, the safety of our residents is our north star, and we recognize that many of our residents do not currently feel safe. We are working hard every day across our ecosystem to ensure that every part functions in a way that will increase safety across our city; and a major reform to the criminal code, no matter how necessary, is sure to impact that functioning.

Our public safety and justice ecosystem is unique in the wide range of local and federal individuals and entities that participate in it. In order to ensure that we act in a manner that advances the administration of justice while also advancing public safety, it is imperative to ensure that an

implementation plan has ample time for all of those involved in the system to be appropriately educated and trained on the changes. It will also require our PSJ cluster agencies to ramp up operations to ensure that happens. Currently, my office and PSJ cluster agencies are still in the process of trying to assess the impact of the proposed legislation, on operations, service delivery to the residents, the time needed to train employees on the RCCA, and the practical realities of implementing such a comprehensive systemic change. However, here are a few notable concerns raised thus far. The RCCA:

- Changes the elements required to establish probable cause for all offenses, which will require at minimum, 80 hours or more for retraining of all MPD members, and an investment to train individuals with the authority to take police reports or make arrests in the District.
- Replaces the word "victim" with complainant, which could have unintended consequences for victims' rights and compensation. I recommend the Council speaks with Director Garcia (OVSJG), who has also identified several provisions for further review, including the failure to adopt the Model Stalking Code and issues surrounding consent.
- Creates a new kind of probation called "deferred disposition" for all misdemeanors. More individuals on probation may require additional supervision from CSOSA. The Committee needs to ensure CSOSA has the staff, resources, and capability to implement this successfully, to limit inconsistency and frustration.
- Potentially strains our already stretched justice system by expanding jury demandability and access to "Second Look" judicial review. This vast expansion of trials and hearings would strain both prosecutorial and court resources. It is the Executive's concern that this added workload on the courts will result in delayed justice for victims, as victims will need to wait longer for cases to resolve at trial. To give an idea of the potential magnitude of the shift, in 2019, only 11 out of over 600 misdemeanor trials were held before juries, where under the RCCA, approximately 300-400 of those trials would be eligible for juries.

While not exhaustive, the above concerns demonstrate the types of issues that should be addressed and resolved in advance of implementation. The more time allowed for thoughtfulness, collaboration, and communication amongst impacted stakeholders, the better the impact on our public safety and justice ecosystem, and more importantly on our residents and their safety.

This is not the first time the Council has undertaken major reform so there are models for us to follow. One example is the Zoning Regulations Rewrite (ZRR) of 2016. The ZRR began in 2007 with the Zoning Commission holding two roundtables and concluded on January 14, 2016 with the Zoning Commission voting unanimously to adopt text to revise the DC Zoning Regulations and approve map amendments to implement that text. It was the first time the Zoning Regulations and Zoning Map were comprehensively revised since 1958. The DC Office of Zoning held over 100 trainings, community meetings, public hearings, and public meetings to address concerns, gather feedback, provide information, deliberate, and afterwards, pass regulations.

I am not suggesting this process needs to take 9 years, but, rather highlighting that this major reform requires equally thoughtful deliberation around implementation, hearing from the actors who will implement the law, and most importantly, hearing from the community who it will impact.

The Executive looks forward to continuing to work with the Council, our public safety and justice ecosystem partners, and our residents to ensure we have a justice system that is advancing the administration of justice while also advancing the safety of our residents and city.

TESTIMONY OF PAUL BUTLER
THE ALBERT BRICK PROFESSOR IN LAW
GEORGETOWN UNIVERSITY LAW CENTER
December 16, 2021

This is written transcript, with some citations added, of my oral testimony on December 16, 2021.

Councilmember Allen,

Ladies and gentlemen,

My name is Paul Butler and I represent the United States.

When I was a prosecutor that's how I used to start my opening statement to the jury.

Many years ago I had the high privilege of serving as a Special Assistant United States Attorney in the District of Columbia. I represented the government in Superior Court where I prosecuted misdemeanor crimes.

During the time that I did that work, I learned two lessons that have informed my work as a scholar and teacher and proud citizen of the District of Columbia. Those two lessons inspired my testimony this morning about the urgency of the revised criminal code act.

The first lesson was about juries, and I had to learn it the hard way.

After my service in the US Attorney's Office, I moved to main Justice where I prosecuted public corruption crimes. We were prosecuting a United States senator for stealing money from taxpayers.

While I worked on that case, I got arrested by the DC Metropolitan Police Department and prosecuted by the United States Attorney Office for the District of Columbia – by the same misdemeanor squad that I had worked for.

I was prosecuted for a crime I did not commit – simple assault – a misdemeanor.

I remember when we were rookie prosecutors, were in training for how to prosecute those cases, the boss joked there is nothing simple about simple assault. I laughed then.

I did not yet understand that there is nothing simple about any accusation of crime – even a misdemeanor.

My case was literally called the United States of America versus Paul Butler. Imagine how you would feel – understand how much the Constitution means to someone in that situation – the guarantees of due process, equal justice, criminal laws that are clear and coherent and fair.

Imagine if it were the United States of America versus you, how crucial it would be to have a constitutional right to a trial jury of your peers – your fellow citizens of the District of Columbia.

My case happened because of a dispute with a neighbor over a parking space. Even in the 1990's – parking space were a premium in our city. My neighbor called the cops and told them I pushed her. She showed them where I lived, the officers saw a young black man, and they arrested me.

I hired the best lawyer in the District of Columbia – an African American woman named Michelle Roberts – who had been the Executive Director of the District of Columbia Public Defender Service. PDS is widely considered the best public defender agency in the country.

Ms. Roberts tried to get the Prosecutor's Office to drop the case, but they wouldn't – for what we later learned were political reasons.

They offered me a good deal **–** community service and the case would be dismissed.

No – I told Michelle Roberts – I am innocent. All – the best lawyer in the District of Columbia told me – you are a citizen of a city and a country where you have constitutional rights **–** let's take this case to the people of the District of Columbia.

We went to trial.

12 DC citizens sat as jurors in my misdemeanor trial. The case took about two or three days. The prosecution presented its evidence, and then, I took the stand in my own defense. After the jury was sent to deliberate.

Less than 30 minutes later there was a knock on the door. The jury probably has a question my lawyer told me.

But that one time the best lawyer in the District of Columbia was wrong. The jury had a verdict.

I'm not going to tell you what happened because I want you to read my book – Let's Get Free – where I tell the whole story. You can check the book out from one of our city's fine public libraries or purchase it at one of our great local bookstores.

But I will give you a hint. Things worked out fine.

Many years later in the superior court, my case was expunged on the grounds that I was innocent. Things worked out because I had Michelle Roberts as my lawyer.

Things worked out because as a resident of the United States of America and the District of Columbia I had the right to a trial by a jury.

This was in the 1990's, but then the law in this great city went backwards.[1]

Today, I would not have the right to a trial by a jury in the District of Columbia.[2]

In 1994, the same year that the US congress passed the infamous Crime bill of 19994 this council passed its own crime bill.

After great pressure from the Prosecutor's Office, the City Council enacted the Misdemeanor Streamline Act of 1994.[3]

It took away the right to trial by jury for people accused of most misdemeanors.[4]

Now citizens of the District of Columbia do not have the same right to a jury trial as citizens have in most states.

This is not because of congressional interference by people who are opposed to self-determination in DC – it's our own city council that 30 years ago – make DC residents less than full citizens.

The framers of the Constitution understood the direct relationship between the right to trial by jury and democracy.[5]

In Maryland[6] or Virginia,[7] the person who gets accused of a misdemeanor can be judged by a jury of their peers. People in the District of Columbia do not have that same right.

You heard that right – in the District of Columbia – right now you can get locked up and serve time for a crime where you do not have the right to a jury trial.[8]

The revised criminal code act of 2021 restores to people in the District of Columbia the same right to a jury trial that people have in at least 40 states.[9]

It established a gradual process where people accused of misdemeanors for which there is prison time are entitled to have a jury decide their case. The act establishes a three-year process to make sure the courts can restore our rights efficiently and with absolutely no cost to public safety.

Respectfully, the City Council should hear the words of Eric Washington the former Chief Judge of the District of Columbia Court of Appeals. In a judicial opinion in 2018, he strongly suggested

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[1] D.C. Code § 16-705 (b)(1)(A).
[2] *Id.*
[3] Omnibus Criminal Justice Reform Amendment Act of 1994, 41 D.C. Reg. 2608, 2609-12 (1994).
[4] *Id.*
[5] U.S. Const. amend. VI.
[6] *See* Md. Const. Decl. of Rts. art. 21, 23 (West 2021).
[7] *See* Va. Code Ann. § 8.01-336 (West 2021).
[8] Omnibus Criminal Justice Reform Amendment Act of 1994, 41 D.C. Reg. 2608, 2609-12, (1994).
[9] Revised Criminal Code Act of 2021 § 202.

that this Council reconsider its decision to take away the right to a jury trial. Chief Judge Washington was concerned about democracy, the Constitution, and racial justice. He noted that if DC residents get back our jury trial rights, that would be an important message to send at a time when communities of color are openly questioning the system.[10]

The second lesson I learned as a DC prosecutor was about racial justice.

When I got arrested, I was taken to Superior Court to be arraigned. I had prosecuted cases in front of many judges, and I was thinking how embarrassed I would be if the judge who recognized me.

She didn't.

When I was in that courtroom, I was just one of the hundred black men on the lock up list that day.

That is one thing that has not changed between the 1990's and now.

The men, women and children in the DC criminal legal system – the people who are awaiting trial or locked up - do not reflect the glorious diversity of our city.

If you go to Superior Court in the District of Columbia today, you would think that white people do not commit crimes. They are almost entirely absent from the criminal court.[11]

The murder of George Floyd ignited the largest social justice protests in American history. In this national reckoning on race, President Biden has pledged to eradicate structural racism – that is the bias that is built in – including bias that is embedded in criminal law and police practices.[12]

The Code Revision Act advances that worthy goal.

The Act is not explicitly about racial justice or civil rights – but it takes some important steps towards bringing equal justice under the law to all DC citizens.

Right now the DC incarceration rate is about the highest in the nation.[13] Almost everybody locked up is Black or Latinx.[14]

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[10] *See Bado v. United States*, 186 A.3d 1243, 1264 (D.C. 2018)

[11] Washington Lawyer's Committee for Civil Rights and Urban Affairs, Racial Disparities in Arrests in the District of Columbia, 2009-2011, (Dec. 24, 2021), https://www.washlaw.org/pdf/wlc_report_racial_disparities.pdf.
[12] Joe Biden for President Official Campaign, The Biden Plan for Strengthening America's Commitment to Justice, (Dec. 24, 2021), https://joebiden.com/justice.
[13] Prison Policy Initiative, District of Columbia Profile, (Dec. 24, 2021), https://www.prisonpolicy.org/profiles/DC.
[14]District of Columbia Department of Corrections Facts and Figures October 2021, (Dec. 24, 2021), https://doc.dc.gov/sites/default/files/dc/sites/doc/publication/attachments/DC%20Department%20of%20Corrections%20Facts%20and%20Figures%20October%202021.pdf.

The act ends the draconian mandatory minimum sentences that throw the book at accused people without allowing our fine judges to do justice in individual cases.[15]

The revised code also allows judges to look at cases in which people have been incarcerated for 15 years or more and consider letting them come home only if the judge finds that they pose no public safety threat.[16]

The revised code reduces indefinite life sentences while still imposing what are still extremely harsh sentences for the most serious offenses.[17]

For example, under the revised code people convicted of murder can be sentenced to 40 or 45 years in prison.[18]

For black men that is effectively a life sentence since our life expectancy in the District of Columbia is under 69 years.[19]

I respectfully suggest that there is much more that the city council can do to make Black lives matter in the DC criminal legal system but this act is an important first step.

To the honorable members of the District of Columbia City Council, you may not get to say like I did when I was a prosecutor that you represent the United States.

But as you consider the revised Criminal Code Act of 2021 you have the opportunity to represent this great country and this great city's highest ideals and most important values. The right to a trial by jury for every crime for which you can get jail time. Equal justice under the law.

I respectfully urge you to pass the revised Criminal Code Act of 2021.

Respectfully,

Paul Butler
The Albert Brick Professor in Law
Georgetown University Law Center
Paul.Butler@law.georgetown.edu

[15] Revised Criminal Code Act of 2021 § 22A-603.
[16] Revised Criminal Code Act of 2021 § 205.
[17] Revised Criminal Code Act of 2021 § 22A-603.
[18] *Id.*
[19] Christina Sturdivant, Report: Life Expectancy in D.C. Differs Greatly By Race, Dcist (Dec. 24, 2021, 4:04 PM), https://dcist.com/story/16/07/05/life-expectancy/.

Testimony of Donald Braman

Associate Professor of Law

The George Washington University Law School

Committee on the Judiciary & Public Safety

December 16, 2021

B24-0416, the "Revised Criminal Code Act of 2021"

Chairperson Allen and Members of the Committee on the Judiciary & Public Safety:

Thank you for holding this hearing and for allowing us to testify regarding the Revised Criminal Code Act of 2021. And thank you Council Chairperson Mendelson for creating the Commission itself, and for your support for making our criminal code more rational, fair, and consistent.

This is how a jurisdiction should go about reforming its code. Although it has been an incredibly laborious process, that is because it has been so methodical and so transparent. The Commission reviewed and incorporated counsel and advice from many, many stakeholders and national experts. The Commission published every interim draft and finding, and made sure stakeholders had every opportunity to weigh in. The amount of work that Director Schmechel and his staff put into developing detailed reviews of every aspect of this bill, then soliciting feedback and integrating discussion and suggestions is staggering. Kathy Patterson should be proud for starting the process, Chairman Mendelson for giving the Commission the authority, scope, and resources to do the work required, the Committee's members and staff for the careful guidance provided as the Commission's work transitioned from a recommendation into a bill, and the District as a whole should be proud of all the work that stakeholders, advocates, community members, and Commision staff have done to produce a bill that reflects our community's core values.

At the outset, I want to note that the proposed reforms, while extensive, are fundamentally remedial measures. They do not constitute a radical reform of our public safety system; rather, they make only the most obvious and necessary reforms to our criminal code and process. As others have noted repeatedly, several significant additional reforms could be undertaken, but are not a proper part of this bill. The RCCA does not, for example, end pretextual stops or bar jump outs, nor does it institute robust employment programs that reduce recidivism, nor does it require regular review of criminal provisions and enforcement for evidence of real-world impacts on public safety. What this bill does is provide a solid and straightforward rationalizing and standardizing of our criminal code, and it restores some basic procedural protections for District residents commensurate with those afforded most residents of our nation. This bill is a necessary and, thankfully, uncontroversial step that appropriately leaves more contentious public safety reforms for another day.

For the remainder of my testimony, I want to focus on the bills's reform of felony murder and associated accomplice liability. Among experts in criminal law there is nearly universal

disapproval of felony murder doctrine, and the trend is to dispense with felony murder altogether or, at the very least, disallow first degree murder. I want to lay out why the District should join other jurisdictions in doing so, and why (short of eliminating felony murder doctrine altogether) the proposed reform is necessary.

The short version of my testimony is this: The District's current felony murder doctrine breaks the normal considerations of proportionality that should inform a criminal code by treating people who have no intention of killing anyone and, in many instances, who do not kill anyone, as if they were the most heinous and malicious of premeditated killers. It should be removed altogether or replaced with the reformed version drafted in the proposed code, with minor adjustments.

Felony murder's core sin is that it treats those who accidentally cause death during certain felonies as if they intended those deaths with malicious premeditation may seem appealing in some ways at first blush, but as experts and judges who have to deal with the consequences of the doctrine across the country observe, closer inspection reveals that felony murder doctrine--and first degree felony murder doctrine in particular--injects incoherence into the law in ways that are unacceptable.

Homicide doctrine has several interlocking parts (mental states, acts causing death, mitigating circumstances, and a variety of defenses) that all work together to generate a system of penalties proportionate to the many ways people cause death. Felony murder ineracts with this carefully graded set of considerations with all the delicacy of a wrecking ball. Felony murder's bypassing of the key considerations that distinguish between every other form of homicide is what makes those who study the criminal law so distressed by codes that allow for this kind of imbalance. Consider the three following hypotheticals:

1. A man breaks into a house by kicking in the door and, with his bare fists, brutally beats his ex-wife and her new family, including two children, to death.

2. A man breaks into a house to steal a stereo that he believes he should have been awarded in his recent divorce. He uses a knife to jimmy the door and silently steal the stereo while his ex-wife and her new family are asleep. While unplugging the stereo, he unwittingly generates a spark that causes a fire that then burns down the house, killing his ex-wife and her new family, including two children.

3. A woman drives her boyfriend to a house to retrieve a stereo from his ex-wife, knowing that he intends to obtain it without his ex-wife's permission. Her boyfriend unwittingly burns down the house, killing his ex-wife and her family.

All three crimes deserve punishment, but under no principled theory of punishment should they be considered equivalent. And yet, under the District's current felony murder doctrine, *all three crimes are all first degree murder*. What's more, having proven the facts described, the job of proving first degree murder in the case of the intentional brutal killing is actually much harder for the prosecution than it is in the scenarios where the deaths result from the felony, because all the traditional proofs of premeditation, deliberation, and possible mitigating circumstances related to the mental state and any possible defenses must also be considered.

The third example is especially egregious because it pushes its disregard of proportionality beyond homicide doctrine itself and into accomplice liability. Typically, accomplice liability requires that any accomplice both intend to assist the principal actor in commission of a crime and share the mental state of the underlying offense. Thus, where a person purposefully provides assistance to someone in killing a person, and they share in the premeditation of the killing that then takes place, it would be appropriate to charge the assisting person with first degree murder via accomplice liability. But where they not only do not assist in a killing, but have no intention of or awareness of a killing, charging them with first degree murder--and any doctrine that allows them to be charged with first degree murder--is outrageously unjust.

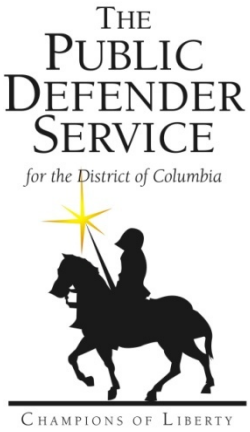
Why would anyone advocate on behalf of a doctrine that is so clearly iniquitous? In practice, the only beneficiaries of the District's current felony murder doctrine are prosecutors to whom it grants outsized power and discretion in a significant minority of cases. And prosecutors are, of course, loath to relinquish this power, and point to examples of very serious killings where their offices have used felony murder as it exists on the books. But when pressed, prosecutors admit that, even if felony murder did not exist, they could charge the same set of facts under serious alternative offenses including, in most cases, a form of homicide or attempted homicide that is equally or more appropriate.

Prosecutors like the over-inclusive felony murder doctrine because it reduces the work that they would otherwise have to do to make a first-degree murder case, and this makes negotiating plea deals or proving murder at trial much easier. But the fundamental property of proportionality in a criminal code is more important than prosecutorial power and convenience. Short-cuts around like felony murder may seem appealing in the abstract, but on close inspection they are corrupting aberrations from the principles that should inform the criminal law.

In conclusion, consistent with nearly unanimous expert opinion, and also consistent with reform efforts across the country, I recommend that the District either dispense with felony murder doctrine altogether or restrict its use to second degree murder charges or to relevant accomplice liabilty charges where an accomplice is reckless with respect to the risk of death. This would restore the normal considerations of proportionality that we all support, and around which a criminal code should be constructed.

Based on these policy considerations, and consistent with other states that have reviewed and reformed their criminal codes but retained some form of felony murder, restricting felony murder to murder in the second degree and restricting accomplice liability to instances where the accomplice is reckless with respect to death is a reasonable reform. Doing so would address the most egregious concerns about proportionality while retaining the doctrine itself.

To be very clear, however, other jurisdictions have simply removed felony murder altogether and have not suffered any ill effects as a result. Several states (including, earlier this year, Illinois) have made this reform. Lawmakers and judges in those states, through extensive analysis similar to that undertaken by the Commission here in the District, have reviewed and discarded the broken doctrine of first-degree felony murder. In doing so, they joined several other states in which responsible review led them to say good-bye and good-riddance to this antiquated and iniquitous part of their law.



TESTIMONY OF THE PUBLIC DEFENDER SERVICE
FOR THE DISTRICT OF COLUMBIA

concerning

Bill 24-0416, THE REVISED CRIMINAL CODE ACT OF 2021

Presented by
Laura E Hankins

before

COMMITTEE ON THE JUDICIARY & PUBLIC SAFETY
COUNCIL OF THE DISTRICT OF COLUMBIA

Chairman Charles Allen

December 16, 2021

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Thank you for the opportunity to testify at this hearing on Bill 24-0416, the Revised Criminal Code Act of 2021. I am Laura Hankins, General Counsel at the Public Defender Service for the District of Columbia. I was the PDS representative to the Code Revision Advisory Group. With me today is my colleague Katerina Semyonova, who is the Special Counsel to the Director on Policy and Legislation at PDS and who was my partner on Advisory Group work. It's good to be back before the Council discussing reforming the District's criminal code. I first testified before the Council on the subject on May 31, 2005 at a public hearing on Bill 16-172, the Criminal Code Reform Commission Establishment Act of 2005. The bill had been introduced by Councilmember Kathy Patterson as a result of her work grappling with aspects of the criminal code when she was Chair of the Judiciary Committee. The May 2005 hearing was before then-Chair of the Committee on the Judiciary, Phil Mendelson.

The Committee Report on the bill begins by quoting Patricia Riley, then the Special Counsel to the U.S. Attorney: "*Like any document crafted by different authors at different times spanning a century or more, the criminal code of the District of Columbia has some archaic, inconsistent and occasionally confusing language and … some instances where the punishment does not fit the crime. A thorough review of the code is therefore in order.*"[1] The Committee Report goes on to note that the Committee had received no testimony in opposition to the establishment of the commission but that witnesses presented some common themes about the bill. As the Committee astutely remarked: "*Another theme [of the public hearing witnesses' testimony] is that the work proposed by this legislation will take time.*"[2] Sixteen years and some months after I testified in support of the original code reform commission bill, I'm back and pleased to express PDS's support for Bill 24-0416, the Revised Criminal Code Act of 2021.

I want to thank D.C. Auditor Kathy Patterson for introducing the original bill and thank Council Chairman Mendelson for shepherding that bill through the Council when he was Judiciary Chair. But more importantly, I want to thank Chairman Mendelson

[1] Report on Bill 16-17, the Advisory Commission on Sentencing Amendment Act of 2006, at p. 1. https://lims.dccouncil.us/downloads/LIMS/15500/Committee_Report/B16-0172-COMMITTEEREPORT.pdf

[2] *Id*. at 2.

who, when it became clear that as part of the D.C. Sentencing Commission's mandate, criminal code reform would never move forward, introduced amendments to create the D.C. Criminal Code Reform Commission with a more clear and reform-oriented mandate and structure. We would not be where we are today without Chairman Mendelson's 16 years of support for the criminal code reform project. Thank you also to Richard Schmechel for having done an excellent job as the Executive Director of the Criminal Code Reform Commission and to all the commission staff, past and present, who worked on this project so tirelessly and sometimes through incredibly difficult circumstances. And thank you Chairman Allen, and your staff, for holding today's hearing and the two previous hearings on this extensive and important bill and for all the work you are doing to carry the bill across the finish line.

Before I explain PDS's support for the bill and make specific recommendations for further reform, I want to spend another moment on the history of the criminal code reform project because I think it is critical to understanding the bill and today's hearing in particular. Pat Riley and I and others made a mistake back in 2005 when we strongly suggested that instead of an independent commission, the code reform work should be included as part of the mandate of the D.C. Sentencing Commission. One issue was the Sentencing Commission had as voting members 3 associate judges from the D.C. Superior Court. Because of the separation of powers principle, the judges rightly felt that they could not participate in discussions of criminal law reform. So the project was an awkward fit for the Sentencing Commission from the very beginning; the work and the staff were then treated as being of little importance. But the more fundamental problem was that the Sentencing Commission, at least at the time, was run by the Chair on a consensus model and the voting members (agency representatives and appointed community members) dictated the final proposals. The staff did research and made suggestions for code reform, but were powerless to make final decisions. Not surprisingly, the Public Defender Service and the U.S. Attorney's Office as voting members could never reach consensus and the code reform project began to atrophy. When the work transferred to the newly established Criminal Code Reform Commission in 2016, the model shifted 180 degrees. The Commission staff, which smoothly transitioned from the Sentencing Commission to the new independent commission,

issued reports. While the Advisory Group met monthly to discuss the reports and were able to submit written comments on the reports,[3] the Commission's Executive Director and staff made the final decisions and recommendations. Thus, the final product of the Commission, which has become Bill 24-0416, represents thousands of hours of Commission staff work but also hundreds of hours of work by Advisory Group members whose criticisms and suggestions were sometimes adopted and sometimes rejected but always carefully considered by the Commission staff.

Bill 24-0416 is an incredibly thoughtful and comprehensive legislative proposal that represents the careful study of other jurisdictions, best practices, and academic writings. While PDS very much supports passage of the Revised Criminal Code Act, we disagree with some of the recommendations made by the Commission and urge this Committee in those areas to act more boldly. My written testimony addresses the following: PDS's support for the provisions in the bill that would eliminate mandatory minimum prison sentences, expand the statutory right to a jury trial, and expand the resentencing provision colloquially known as "second look." My written testimony also addresses PDS's opposition to certain provisions in the bill and specifically urges the Council to eliminate felony murder, create a warning requirement for trespass, reduce the proposed maximum prison penalties, and reduce the length of supervised release terms.

Support for the bill's elimination of mandatory minimums

As PDS and the USAO often disagree about policies, I want to start with an issue on which, I am glad to say, we finally agree. Six months ago, at the June 21, 2021 symposium on the criminal code reform final report, I was pleasantly surprised to learn that the U.S. Attorney's Office supports the elimination of mandatory minimum prison sentences as proposed by the Criminal Code Reform Commission and as provided for in the bill. In voicing this position at the symposium, my fellow Advisory Group member, Special Counsel to the U.S. Attorney Elana Suttenberg, quoted Attorney General Garland,[4] who said at his Senate confirmation hearing: *"We should do as President Biden has suggested and seek*

[3] PDS alone submitted almost 200 pages of comments.

[4] https://www.youtube.com/watch?v=8Z2XniWMK3k. Statement on mandatory minimums begins at 23:58 minutes.

the elimination of mandatory minimums so that we once again give authority to … trial judges to make determinations based on all of the sentencing factors that judges normally apply."[5] PDS agrees. Ending mandatory minimums would increase sentence proportionality by allowing judges to individualize a person's sentence, based on the circumstances of the individual being sentenced and based on the circumstances of the offense, not just the fact of an offense. For felony sentencing in the District, we have the sentencing guidelines. Despite being voluntary, Superior Court judges overwhelmingly comply with the guidelines – with the 2020 compliance rate of 99% the highest rate to date.[6] Thus, mandatory minimum sentences are not necessary to achieve the goal of reducing unwarranted disparity between sentences or even of guiding the judge to impose some prison time for many offenses. The reason the U.S. Attorney's Office supports, and the reason that those who favor D.C. statehood, Home Rule, and local control and accountability to District residents should oppose all mandatory minimums, is that mandatory minimums give massive power to prosecutors. In the District, that means massive power to *federal* prosecutors who are wholly unaccountable to District residents, this Council, or to the Mayor. Prosecutors have sole control over what charges to bring against someone. For the same conduct, they can decide to charge a person with a 6-month threats offense or with a 20-year threats offense.[7] Mandatory minimums allow the federal prosecutors to charge an offense that will require the judge to impose a long prison sentence or charge an offense that will leave the sentence up to the judge's discretion.

PDS has long called for the elimination of mandatory minimums from the District's criminal code and fully supports that reform as included in the Revised Criminal Code Act.

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[5] https://thenewsstation.com/merrick-garland-promises-new-day-for-addicts-marijuana-prisons/

[6] *See* District of Columbia Sentencing Commission, *2020 Annual Report*, page 43. https://scdc.dc.gov/sites/default/files/dc/sites/scdc/service_content/attachments/Annual_Report_2020.pdf While there is reason to believe that the COVID-19 makes 2020 an anomaly, the rate of judicial compliance was above 89% each year between the years of 2011 and 2020. *Id*. at 47.

[7] D.C. Code § 22-407, threats to do bodily harm, allows for a maximum term of imprisonment of 6 months. D.C. Code § 22–1810, threatening to kidnap or injure a person or damage his property, encompasses the conduct of the misdemeanor offense and allows for a maximum term of imprisonment of 20 years.

Support for the bill's expansion of the statutory right to a jury trial

PDS also supports the bill's expansion of the statutory right to a jury trial. In the 1970's and 1980's, District law provided a jury trial when a person was charged with an offense that carried a penalty of more than 90 days.[8] In 1992, in the name of efficiency, the threshold was raised to entitle a person to a jury trial if they were charged with an offense that carried a penalty of more than 180 days.[9] Two years later, in 1994, in the midst of the crack epidemic and a local budget crisis, the District passed, "misdemeanor streamlining," and changed the penalty for most misdemeanors from 1 year to 180 days with the express purpose of depriving people of jury trials in misdemeanor cases.[10] Having been given an inch, the USAO seized a mile to deprive people of jury trials by stacking misdemeanor offenses. For example, in one case, the USAO broke down a rape charge (a jury demandable offense) into 5 non-jury trial demandable misdemeanors.[11] In response to USAO's misdemeanor stacking practices, the Council passed the Misdemeanor Jury Trial Act of 2002 to require a jury trial where an individual faces *cumulative* incarceration of more than two years as a result of multiple misdemeanor offenses.[12] Thus, under current law, a person is entitled to a jury trial if they are charged with a criminal offense that carries a penalty of more than 180 days; or if the cumulative punishment for non-jury demandable offenses is more than two years of incarceration.[13]

In another complication in this body of law, in 2018, the D.C. Court of Appeals held in *Bado v. United States* that the Sixth Amendment entitles a person to a jury trial, regardless of the maximum prison sentence they face, if the person is charged with a

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[8] *See The District of Columbia Court Reform and Criminal Procedure Act of 1970*, 84 Stat. 556, Pub. L. 91-358, title I, § 145(d)(4) (July 29, 1970).

[9] D.C. Law 9-272, the Criminal and Juvenile Justice Reform Amendment Act of 1992 (May 15, 1993).

[10] *See* Title I, Misdemeanor Streamlining, of D.C. Law 10-151, the Omnibus Criminal Justice Reform Amendment Act of 1994 (Aug. 20, 1994).

[11] *See* Report on Bill 14-2, the Misdemeanor Jury Trial Act of 2001, at page 7. https://lims.dccouncil.us/downloads/LIMS/10114/Committee_Report/B14-0002-COMMITTEEREPORT.pdf

[12] D.C. Law 14-135 (May 21, 2002).

[13] *See* D.C. Code § 16-705(b).

criminal offense that could result in their deportation from the United States.[14] The District's current jury trial laws make our jurisdiction one of the most restrictive places in the country for jury trial rights – and jury trial rights depend on citizenship status, with U.S. citizens being deprived of jury trial rights despite being charged with misdemeanor offenses that, in addition to incarceration, may require sex offender registration and may create significant barriers to employment, education, and housing. Ironically, despite being a place that prizes democratic principles of representation and laments their absence, the District deprives residents of the essential right of trial by jury in the service of efficiently obtaining convictions – convictions that affect the District's Black residents with *gross* disproportionality.[15]

Because of the current law, in the 16 years that I did policy work on behalf of the Public Defender Service and testified and worked on dozens of criminal bills being considered by the D.C. Council, whenever a bill would create a misdemeanor offense, the U.S. Attorney's Office would propose the offense carry a 180-day penalty and I would propose a 6-month penalty, a penalty difference of only a few days but the critical difference between a non-jury or jury demandable offense. With their charging decisions, the U.S. Attorney's Office is not just depriving D.C. residents of the right to a jury and depriving D.C. citizens of the right to sit on these juries; as the Council has repeatedly tried to strike a balance between the fundamental right to a jury trial and judicial efficiency,[16] the USAO also has repeatedly used its power and discretion to ignore the Council's will. The Neighborhood Engagement Achieves Results Amendment Act of 2016, commonly referred to as the NEAR Act, increased the penalty for the offense of assault on a police officer to 6 months imprisonment and made the penalty for the new offense of resisting arrest 6 months imprisonment for the express purpose of making those offenses jury-demandable. Multiple witnesses came before the Council at the hearing on the NEAR Act and made the case for the importance of jury trials for these

[14] *Bado v. U.S.*, 186 A.3d 1243 (D.C. 2018) (en banc).

[15] The racial disparity in the District's criminal legal system is gross both in the sense of it being flagrant and obvious, and in the sense of it being disgusting and offensive.

[16] *See e.g.,* Report on Bill 14-2, the Misdemeanor Jury Trial Act of 2001, at page 2.

offenses.[17] Despite the will of the people and contrary to the intent of this Council, the U.S. Attorney's Office routinely charged the 180-day offense of simple assault for an alleged assault on a police officer, rather than the jury demandable charge of assault on a police officer. These charging decisions by USAO hid police conduct from the public and likely resulted in more easily obtainable convictions.

The importance of the right to a jury trial and the harm caused by the deprivation of that right and by the Council's curtailment of that right for the sake of judicial economy, were addressed by Former Chief Judge, now Senior Judge, Eric Washington in a powerful concurrence to *Bado*. In his concurrence, Senior Judge Washington observed that *Bado* created a disparity between the jury trial rights of citizens and noncitizens that, "in [his] opinion,"[18] the legislature should address and noted that the Council "could reconsider the decision to value judicial economy above the right to a jury trial." "Restoring the right to a jury trial in misdemeanor cases could have the salutary effect of elevating the public's trust and confidence that the government is more concerned with courts protecting individual rights and freedoms than ensuring that courts are as efficient as possible in bringing defendants to trial. This may be an important message to send at this time because many communities, particularly communities of color, are openly questioning whether courts are truly independent or are merely the end game in the exercise in police powers by the state."[19]

Senior Judge Washington quotes John Adams: "Representative government and trial by jury are at the heart and lungs of liberty."[20] When we District residents are already deprived of the full representative government that we deserve, the *least* the officials whom we are able to elect can do is preserve and extend *as far as possible* the right to a trial by jury. To deal with the impact that making all offenses that carry a penalty of time in prison jury demandable will have on the Superior Court's federal budget and on judicial assignments, there is a 3-year lag time in the bill. That is, offenses

[17] See Report on Bill 21-0360, the Neighborhood Engagement Achieves Results Amendment Act of 2016. https://lims.dccouncil.us/downloads/LIMS/34496/Committee_Report/B21-0360-CommitteeReport1.pdf

[18] *Id*. at 1262.

[19] *Id*. at 1264.

[20] *Id*.

that carry a penalty of 60 days would be jury demandable when the law first takes effect and then 3-years after the effective date of the law, all offenses that carry any prison penalty would become eligible for jury trials. PDS supports this approach.

Support for the bill's expansion of "second look"

One of the changes that I have been really glad to see take place in the District and on this Council is a growing realization that justice does not have to mean imprisonment for as long as possible and that mercy does not have to be doled out in teaspoons. The criminal legal system needs safety valves; there should be fewer on-ramps into the system and more off-ramps out of the system to provide for justice and mercy. Prosecutors, and certainly not the federal prosecutors who are unaccountable to D.C. residents, should not be the gatekeepers for all of the mercy and non-criminal outcomes possible. There should be statutes that authorize the courts to also act as gatekeepers, giving judges the discretion to close an on-ramp into the system – for example, through the authority to dismiss cases that caused minimal or unforeseen harms – and giving judges the discretion to open an off-ramp or safety valve out of the system – for example through an expanded "second look" provision.

People can change, a lot, over the course of 15 years. The 33-year-old changed since they were 18; the 40-year-old isn't the same as they were when they were 25 nor is someone the same at age 50 that they were at age 35. A second look provision provides a second chance. Such a provision merely allows a judge to consider, on an individual level, whether release is now appropriate. Currently, persons who committed offenses when they were not yet 25 years of age can become eligible for a "second look" pursuant to the Incarceration Reduction Amendment Act (IRAA)[21] and persons who are 60 years of age or older can become eligible for compassionate release.[22] The people who fall in between those two groups are no less deserving of an individualized second look and second chance.

[21] *See* D.C. Code § 24-403.03.

[22] *See* D.C. Code § 24-403.04(a)(2).

The Model Penal Code (MPC)[23] endorses second look provisions as an essential element of criminal justice reform. The MPC recommends that a judge or panel rule on applications for sentence modifications from prisoners who have served 15 years of any sentence of imprisonment, regardless of their age at the time of the offense.[24] The Model Penal Code's recommendation for a second look provision stems both from concerns about the United States' extraordinarily high incarceration rate and "the belief that governments should be especially cautious in the use of their powers when imposing penalties that deprive offenders of their liberty for a substantial portion of their adult lives. The provision reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still."[25]

Further, a second look provision not only allows for the person convicted of the crime to grow and improve, it allows society to grow and improve as well, for example the way we think differently now about crack versus powder cocaine or how it is more widely seen that labeling label children super-predators was racist, dehumanizing, and harmful. PDS supports the expansion of the criminal code's second look provision; for the District to do otherwise would be to deny the possibility that *everyone* is capable of change, including ourselves.

Eliminate felony murder[26]

PDS disagrees with the approach the Criminal Code Reform Commission took with respect to felony murder and urges this Committee to amend the bill to eliminate

[23] The Model Penal Code is a project of the American Law Institute. https://www.ali.org/

[24] § 305.6. Modification of Long-Term Prison Sentences; Principles for Legislation. Available at https://robinainstitute.umn.edu/sites/robinainstitute.umn.edu/files/mpcs_proposed_final_draft.pdf.

[25] *Id*. at 568. ***S****ee also* Sentence Reduction Mechanisms in a Determinate Sentencing System, 21 Fed.Sent.R. 211 (2009) Discussing ABA's sentencing roundtable and noting that "If there was a single point of consensus around the table, it was that a just sentencing system ought to include some second look mechanism for mitigating the necessary harshness of the first look, particularly when a prison term is very long and a prisoner's circumstances (or society's views) have changed since the sentence was imposed."

[26] PDS calls for the elimination of "felony murder" currently proposed in the bill at Revised Criminal Code § 22A-2101(b)(3) and for the similar negligent manslaughter offense currently proposed in the bill at Revised Criminal Code § 22A-2102(b)(3).

felony murder entirely from the District's criminal code. The current criminal code is an extreme version of felony murder. It allows a person to be convicted of *first*-degree murder for causing the death of another, regardless of the person's mental state, as long as the death was caused while the person was committing or attempting to commit an enumerated offense, such as robbery.[27] That is to say, under current law, causing the death of another is a strict liability element and all that must be proved is that the person "caused" the death of another and did so while committing a particular offense. Admittedly, the proposal in the Revised Criminal Code Act is an improvement upon the current law. It would allow a person to be convicted of *second*-degree murder if the person *negligently* causes the death of another, other than an accomplice, by committing the lethal act in the course of and in furtherance of committing or attempting to commit an enumerated offense, such as 2nd degree robbery. The Revised Criminal Code would abolish the manifest injustice of holding a codefendant who did not cause the death responsible for a death caused accidentally by another person. That expansive application of felony murder has resulted in extremely lengthy sentences, including life, for codefendants who never possessed a weapon and who never intended or acted to physically harm anyone. This application of felony murder has already been abolished in states such as California.

The problem with the Revised Criminal Code's approach to felony murder is that negligence is too low of a mental state to result in a murder or even a manslaughter conviction. This is not recklessness – where the person is aware of a substantial risk, disregards that risk, and engages in the conduct anyway. Negligence means that the person *should have been but was <u>not</u>* aware of a substantial risk that their conduct would result in death. The death is essentially an accident. It should therefore not be punished as murder. It should be punished as negligent homicide.

If a person purposely or knowingly caused a harm, or a person acted recklessly as to the harm that would result, generally our society adopts a retributive notion of justice – that the person *deserves* significant punishment for their conduct. However, imposing the same punishment on a person who *accidentally* causes a harm as you would

[27] See D.C. Code § 22-2101.

impose on a person who *knowingly* causes that harm is wrong. And that's what felony murder does – punishes a person for causing an accidental death to the same extent that we punish a person for knowingly causing someone's death. As was noted in the commentary to Hawaii's murder statute about the state's reasons for abolishing felony murder: "Even in its limited formulation, the felony-murder rule is still objectionable. It is not sound principle to convert an accidental, negligent, or reckless homicide into a murder simply because, without more, the killing was in furtherance of a criminal objective of some defined class. Engaging in certain penally-prohibited behavior may, of course, evidence a recklessness sufficient to establish manslaughter, or a practical certainty or intent, with respect to causing death, sufficient to establish murder, but such a finding is an independent determination which must rest on the facts of each case."[28]

Even if it were to abolish felony murder, under the Revised Criminal Code, in instances where an individual negligently causes a death while engaging in a serious felony, that person can be convicted and punished for the felony and also for the offense of negligent homicide, an offense that the Revised Criminal Code expands beyond our current law.[29] This is the course that the Council should take – abolish felony murder and allow for liability for the underlying felony and the homicide offense that corresponds with the mental state of the actor.

The USAO proposes that the Council amend Bill 24-0416. Rather than the bill's current requirement that, in order to convict a person of felony murder, the prosecution must prove that the person committed the lethal act that caused the death, the USAO proposes that the Council create an affirmative defense such that a person would not be convicted of felony murder if they prove at trial that they did not commit the lethal act. First, there is an important difference between a defense and an affirmative defense. For a defense, if there is any evidence of the defense, even if that evidence is in the prosecution's case, the government must prove the absence of at least one element of the defense.[30] For an affirmative defense, however, the burden of production and of proof

[28] Hawaii Rev.Stat., s 707-701.

[29] See Revised Criminal Code Act proposed § 22A-2103.

[30] *See* Revised Criminal Code Act proposed § 22A-201(b)(2). For example, self-defense is a statutory defense. If in an assault case there is any evidence that the defendant acted in self-defense, even if that

shifts to the defendant, who must prove the defense by a preponderance of the evidence.[31] To be clear, the USAO's proposal means that they agree with, or at least accept, the principle in the Revised Criminal Code that a person should not be liable for felony murder if the person did not commit the lethal act that caused the death. To put it bluntly, the USAO accepts that if a person did not commit the lethal act, the person would be innocent of felony murder. Thus, because the USAO asserts that it might be difficult for them to win a conviction for felony murder if they have to prove who committed the lethal act, the USAO proposes that the Council should require that a person prove their innocence; if the innocent person cannot prove that they did not commit the lethal act, then the person will be convicted of and sentenced to prison for 2nd degree (felony) murder.

In arguing for this audacious proposal, the USAO fails to mention that in addition to felony murder it could charge other forms of homicide, including murder, all of which would be eligible for accomplice liability, in instances where there is some difficulty proving who committed the lethal act. In support of shifting the burden to the defense, the USAO gave an example of two people simultaneously shooting at a victim during an armed robbery such that it was impossible to prove whose bullet caused the victim's death. The USAO claimed that in this instance, there may be no liability for murder. What the USAO failed to explain in their testimony is that, depending on the evidence, the USAO could charge both people as accomplices,[32] meaning they would not have to prove which person committed the lethal act, and charge them with the following Revised Criminal Code Act offenses:

- first-degree murder, if the prosecution can show that the shooters acted purposely, with premeditation and deliberation, to cause the death of the armed robbery victim;[33]

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evidence is in the prosecution's case (e.g., an eyewitness testifies that the complainant hit the defendant first), then the prosecution must prove that the defendant did not act in self-defense.

[31] *See* Revised Criminal Code Act proposed § 22A-201(b)(3).

[32] *See* Revised Criminal Code Act proposed § 22A-210.

[33] *See* Revised Criminal Code Act proposed § 22A-2101(a).

- second-degree murder, if the prosecution can show that the shooters knowingly caused the death (that is, they were aware that the conduct of shooting at a person is practically certain to cause the person's death);[34]
- second-degree murder, if the prosecution can show that the shooters recklessly, with extreme indifference to human life, caused the death (that is, they consciously disregarded a substantial risk that the conduct of shooting at someone will cause the person's death, and that conduct of shooting someone was done with extreme indifference to human life);[35]
- manslaughter;[36] and/or
- negligent homicide.[37]

Thus, the impression that there is no murder or other homicide liability possible unless the Council requires that innocent people prove they did not commit the lethal act is quite simply false.

Further, creating an affirmative defense would mean that whether the actor's conduct is sufficient to merit acquittal would rest entirely on a jury's assessment of the defendant's testimony. Much of the credibility determination will depend on the defendant's prior record, education, fear about identifying and negatively testifying about co-actors, and jurors' biases about the defendant and his participation in the predicate felony. This defense would in some instances require the defendant to risk his own safety by testifying about the criminal conduct of multiple other actors. The failure to answer questions about other actors would also lead to claims that the defendant is evasive and not credible. Further, to benefit from this defense, in instances where there is uncertainty about who caused the fatal act, the defendant would have to assume the government's burden and prove that he did not commit the fatal act. The Council should reject the USAO's proposal.

Moreover, because it is overly punitive and unjust, PDS urges this Council to eliminate the offense of felony murder in the District.

Create a warning requirement for trespass

[34] *See* Revised Criminal Code Act proposed §§ 22A-2101(b)(1); 22A-206(b)(1).

[35] *See* Revised Criminal Code Act proposed §§ 22A-2101(b)(2); 22A-206(c)(1).

[36] *See* Revised Criminal Code Act proposed § 22A-2102.

[37] *See* Revised Criminal Code Act proposed § 22A-2103.

The Revised Criminal Code continues to punish the offense of trespass as knowingly entering or remaining in a dwelling, building, or on land without a privilege or license to do so under civil law.[38] The offense of trespass often is one of poverty – it criminalizes actions by individuals who do not have a residence or a place where they can safely spend time. As such, it leads to homeless individuals being arrested when they seek shelter from the cold or the heat or from other people in spaces that are open to the public, but where public access may be limited as to hours. For example, a person who sleeps in a closed metro station would be subject to arrest and prosecution for trespass. Rather than allowing for immediate arrest for trespass, the Revised Criminal Code should include a warning provision that would allow people to avoid arrest and would take a problem-solving approach to the offense. The RCC should make trespass a criminal offense only when an individual enters or remains in an area after having been instructed to leave by police or by someone with lawful authority over the area. Creating a warning provision would allow individuals to comply – thereby alleviating the putatively harmful situation – without creating a criminal record for the individual and the further complication of arrest which includes detention and the relinquishing of property or the inability to protect personal property that may be lost during any period of detention, however brief. For individuals who are struggling with homelessness or who are in crisis, arrest for trespass will only create more harm and will fail to address any underlying reasons for the conduct.

Reduce statutory maximum prison sentences

PDS recommends that the Council reduce the statutory maximum penalties for the felony classes. While the Revised Criminal Code Act appears to take a bold step by lowering some statutory maximum penalties, it only appears bold in the context of the draconian sentences our system now allows. If you read the Commentary accompanying the statutory recommendations submitted by the Criminal Code Reform Commission and undergirding the bill, you will see that the 45-year penalty for Class 1 offenses is arrived at by determining a person's life expectancy. And not just any person. The Commission's frank acknowledgement

[38] R.C.C. § 22A-3701.

that the District excels at incarcerating Black men in particular[39] lays bare the rot, the racism, and the cynicism about the District's criminal legal system that we complacently accept. The proposed statutory maximum penalties in the Revised Criminal Code Act, by acknowledged intention, create a system that sets penalties based on ensuring the possibility that the punishment for a single offense can be longer than the life of the person being punished. "Bottom line, based on current life expectancies, without early release a sentence of the RCC Class 1 and Class 2 maximum penalties… would result in many, if not, most of the persons so incarcerated dying while in prison."[40]

The life-expectancy statistics in the Revised Criminal Code Commentary are important however. Rather than use them to justify penalties that are effectively death sentences, the statistics should justify lowering the sentences. PDS joins witnesses at previous hearings on this bill as well as scholars and researchers who call for setting the absolute maximum sentence for an offense at no more than 20 years of incarceration.[41] Long-term incarceration traumatizes families and perpetuates poverty by depriving families of the support and wages of incarcerated family members. While inflicting deep harm, there is no evidence that sentences beyond 20 years further community safety. Numerous studies have shown that criminal behavior correlates strongly with age and that individuals "age out of crime." Researchers have concluded that "age is one of the most robust predictors of criminal behavior." The age-crime curve "shows that most criminal offending declines substantially beginning in the mid-20s and has tapered off substantially by one's late 30s."[42]

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[39] "The District's criminal justice system disproportionately incarcerates black (sic) men. Demographic information on adult dispositions in Superior Court between 2010-2019 indicates that 91% of those convicted of felonies were black (sic) and 91% were men, making the odds that any given felony conviction in the District would be of a black (sic) male 83%...Yet, black (sic) men comprise only about 20% of the District's population." CCRC Recommendations for the Council and Mayor, Commentary on Subtitle I. General Prt, Chapters 46, at 377. https://ccrc.dc.gov/sites/default/files/dc/sites/ccrc/publication/attachments/Commentary-on-Subtitle%20I.pdf.

[40] Id. at 378,

[41] See e.g. Marc Mauer, *A 20-Year Maximum for Prison Sentences.* Available at: https://www.sentencingproject.org/news/a-20-year-maximum-for-prison-sentences/.

[42] Ashley Nellis, *Still Life: America's Increasing Use of Life and Long-Term Sentences*, May 3, 2017. Available at: https://www.sentencingproject.org/publications/still-life-americas-increasing-use-life-long-term-sentences/.

There is also no evidence that increasing sentences from 20 years to 45 years deters criminal conduct. The study of deterrence has led to the conclusion that it is the certainty of punishment that serves as a deterrent rather than the length of punishment.[43] It is also unrealistic to think that an individual weighing whether to commit a crime would be deterred by 45 years but would not be deterred by 20 years.[44]

While incarcerating older individuals offers diminishing returns from a public safety standpoint, it comes with significant financial costs. Given the District's movement toward statehood, the District can no longer ignore the financial costs of incarceration which have for decades been paid for by the federal government. According to Vera Institute, the average cost of incarceration is $45,000 per year per individual.[45] The cost for care increases for all people as they age, but since health declines more rapidly for incarcerated individuals as a result of poor health care and environmental stress, the costs associated with incarceration will increase sharply as a result of aging.[46] By allowing sentences over 20 years in length, the District will be forced to allocate funds that could go to education, housing, drug treatment and conflict resolution training – the lack or insufficiency of which are all root causes of entry into the criminal legal system – to warehousing older individuals when they pose no threat to public safety.

Renée Hutchins, Dean and Professor of Law at UDC's David A. Clarke School of Law, spoke on a symposium panel organized to discuss the recommendations of the Criminal Code Reform Commission. In discussing how long prison sentences should be, Dean Hutchins astutely argued that before we can answer *how*, as in how long, we have to answer the question *why*. Why are we incarcerating people? Why is incarceration our go-to response whenever there is a harm done in society? Retribution and incapacitation are legitimate purposes of a sentencing scheme. But they should be only part of the

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[43] Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, at 10. Available at: https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/.

[44] *Id*.

[45] Vera Institute, *The Price of Jails*, May 2015. Available at: https://www.vera.org/publications/the-price-of-jails-measuring-the-taxpayer-cost-of-local-incarceration#:~:text=The%20annual%20cost%2C%20per%20incarcerated,the%20total%20cost%20of%20jails.

[46] Marc Mauer, *Long-Term Sentences: Time to Reconsider the Scale of Punishment*, at 10. Available at: https://www.sentencingproject.org/publications/long-term-sentences-time-reconsider-scale-punishment/.

equation. When are we going to recognize that more prison time is not the answer to making our communities safe and to reducing all harm? The Council is now presented with an opportunity to do better. PDS is calling on this Council to seize this chance to make prison, and quite frankly the entire criminal legal system from arrest to charging to imprisonment to supervision, a *much* smaller part of how we respond to harms to individuals and to communities.

Reduce terms of supervised release

PDS urges the Council to reduce the time that individuals are required to spend on supervised release and to set two years as the absolute maximum period of supervision. Long periods of supervision are not only demeaning to individuals, they feed a system of mass incarceration through which supervision officers use minor violations to send individuals to prison for infractions that could be better addressed through community programs or a problem-solving approach. As of 2016, in the United States, as many as 4.5 million people were on probation or parole, amounting to one out of every 55 individuals.[47] "Across the United States, in 20 states, more than half of all state prison admissions in 2017 stemmed from supervision violations. In six states—Utah, Montana, Wisconsin, Idaho, Kansas, and South Dakota—violations made up more than two-thirds of state prison admissions."[48] In February 2021, when arguably fewer people were detained by the United States Parole Commission, nearly 13 percent of non-federal detentions at the DC Department of Corrections were for alleged parole and supervised release violations.[49] Much of this incarceration stems from technical violations, which reflect the over-policing of Black communities and exacerbate the disparities in a system that already incarcerates African Americans at disproportionate rates.[50]

Further, the District should be exceedingly cautious about imposing supervision requirements. As currently structured, supervised release is supervised by the Court Services Offender Supervision Agency (CSOSA), over which the District has no control.

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[47] Human Rights Watch, *Revoked: How Probation and Parole Feed Mass Incarceration in the United States*, July 31, 2020. Available at: https://www.hrw.org/report/2020/07/31/revoked/how-probation-and-parole-feed-mass-incarceration-united-states.

[48] *Id*.

[49] Data provided through the Criminal Justice Coordinating Council.

[50] See supra note 3.

For example, the District is powerless to stop CSOSA's practice of requesting warrants and the arrest of individuals for minor infractions of supervision requirements. Similarly, the District cannot order CSOSA to stop onerous check-in requirements and electronic monitoring for individuals who pose little risk of recidivism. Rather than responding to District initiatives, this federal agency will respond to federal prerogatives that have often run afoul of local interests. Once CSOSA requests a warrant or informs the United States Parole Commission (USPC) of a supervision infraction, the warrant is almost always issued by the USPC, another federal entity over which the District has no control and can exercise no oversight. If the power to rescind supervision rested with judges, then the Council and the Mayor would at least be in a position to legislate surrounding the circumstances that would trigger a revocation and decide the length of incarceration to be served for an infraction. As the District prioritizes achieving statehood, it should not add to the federal control of its residents by relegating them to long periods of federal supervision without meaningful local checks. Until there is a restructuring of the authority of CSOSA and the United States Parole Commission, the clearest way to ensure that the District plays the largest role in the fate of District residents is by limiting the time spent on supervised release and instead proactively working to make programming, housing, education, and employment available to returning citizens in a voluntary fashion that respects their dignity.

Ultimately, Bill 24-0416 is a significant achievement. In passing it, the Council would create a criminal code that is coherent, comprehensive, and statute-based. As the 2005 committee report said, this project took time. But it was time well-spent by an excellent Commission that benefitted from the advice of experts. PDS urges passage of the bill.

BEFORE THE
COUNCIL OF THE DISTRICT OF COLUMBIA
COMMITTEE ON THE JUDICIARY AND PUBLIC SAFETY
COUNCILMEMBER CHARLES ALLEN, CHAIRMAN

PUBLIC HEARING

on

Bill 24-0416, the "Revised Criminal Code Act of 2021"

STATEMENT OF ELANA SUTTENBERG
SPECIAL COUNSEL TO THE UNITED STATES ATTORNEY
UNITED STATES ATTORNEY'S OFFICE FOR THE DISTRICT OF COLUMBIA

Thursday, December 16, 2021, 9:30 a.m.

Virtual Hearing via Zoom

Chairman Allen and Members of the Council:

My name is Elana Suttenberg, and I am the Special Counsel for Legislative Affairs at the United States Attorney's Office for the District of Columbia (USAO-DC). I thank you for the opportunity to appear at today's public hearing regarding the "Revised Criminal Code Act of 2021" (RCCA).

USAO-DC supports the goal of reforming the D.C. criminal code to ensure that statutes are clear and consistent, logically ordered, and proportionate in their penalties. In many ways, the RCCA is consistent with that goal, and we appreciate the Council considering these recommendations further. The RCCA is the product of a tremendous amount of work by the D.C. Criminal Code Reform Commission (CCRC) Executive Director, CCRC staff, and Advisory Group members, and we recognize their efforts. The RCCA creates many positive reforms to the criminal code, and is an important part of criminal justice reform in the District. USAO-DC participated as a member of the CCRC Advisory Group, and we voted in favor of submitting the final recommendations to the Council and Mayor. At the time of the vote, however, we were clear that our vote was not intended to express support for all of the CCRC's recommendations. While we were supportive of moving this process forward, we believe that there are some substantial remaining issues that should be addressed before the Council takes final action.

Our most significant concerns focus on accountability for the most violent crimes (such as child sexual abuse, murder, burglary, robbery, and carjacking), and that some of the RCCA proposals are not integrally related to substantive criminal law and overlook the realities of certain resource constraints impacting Superior Court and our office. My testimony today will highlight those significant concerns, and my subsequent written testimony will address additional concerns.

Provisions that Should Be Disaggregated from the Revised Criminal Code Act

Initially, there are several provisions that are not integrally related to the substantive criminal law that the CCRC was tasked with revising. These provisions should be disaggregated from the RCCA and considered on their own merit as separate legislation. A reform of the substantive criminal laws is already a tremendous endeavor that will have a significant impact on the criminal justice system. The RCCA should focus first and foremost on these substantive criminal laws, and the Council should consider these additional procedural provisions—if at all—once the criminal justice system has responded to the RCCA's impacts. Even though we believe that these provisions should be disaggregated from the RCCA, we offer the following concerns.

Expanded Right to a Jury Trial for Misdemeanors

The RCCA proposes dramatically expanding the right to a jury trial for misdemeanor offenses, such that, within several years, all offenses punishable by any period of incarceration would be jury demandable. *See* RCCA Amendments to D.C. Code § 16-705.

We respect the right to a jury in appropriate cases, including all felony cases. Jury demandability requirements for misdemeanors, however, should remain consistent with current law. When considering any changes to the jury demandability provisions, we strongly encourage the Council to closely engage with D.C. Superior Court to understand their resources, their funding, and how any change would both directly impact cases on the criminal dockets and indirectly impact cases on other dockets through the diversion of resources. Given the import of this change, we would encourage the Council to seek testimony on this proposal from D.C. Superior Court. Under non-pandemic court operations, there are approximately 3 to 5 misdemeanor cases scheduled for trial every day in each of the 6 general misdemeanor courtrooms, and approximately 2 trials a day in each of the 2 domestic violence misdemeanor courtrooms (that is, roughly 110 to 170 misdemeanor trials per week). By contrast, there is approximately 1 felony case scheduled for trial every day in each of the 8 felony courtrooms (that is, roughly 40 trials per week), and approximately 1 felony case scheduled for trial per week for the 4 to 5 calendars that handle the most serious felony cases (including sexual abuse and murder). Creating new rights to demand a jury in misdemeanor cases will strain both court and prosecutorial resources. Jury trials typically take longer to complete than bench trials, and must be scheduled farther in advance than bench trials. Consequently, creating additional misdemeanor jury trials would require more judges, more jurors (which would result in D.C. residents being called for jury duty more frequently), and additional prosecutorial resources. Further, felony cases—especially felony cases involving a detained defendant—are typically prioritized for trials in the court system, so it will likely take longer for misdemeanor cases to go to trial. This may result in delayed justice for victims, as victims will invariably need to wait longer for cases to resolve at trial, even in relatively straightforward misdemeanor cases. To our knowledge, no one has begun to analyze what it would take to create the infrastructure to handle a two-to-four-fold increase in the number of scheduled jury trials, what constraints exist that are beyond the District's control (such as the current size of Superior Court), and what delays in justice could ensue from all of these changes. Given the consequences involved, these issues should be analyzed and discussed before any action is taken.

Deferred Dispositions for Misdemeanors

The RCCA proposes that, for *every* misdemeanor, when a defendant is found guilty of the offense, the court may defer further proceedings and place a defendant on probation before judgment for a period not to exceed one year. Under the proposal, if the defendant does not violate any of the conditions of probation, the court "shall" dismiss the proceedings. Following a dismissal, the defendant may move to seal the arrest and court proceedings. *See* RCCA § 22A-602(c).

We support the desire to expand diversion for low-level offenses, in recognition that a conviction may not be the most fair and just result in all cases. Consistent with that recognition, we have been working to expand our pre-trial diversion program with the goal of maximizing public safety, reducing recidivism, and enhancing a fair and efficient criminal justice system. The RCCA proposal, however, would allow judicially crafted diversion *after* a trial or guilty plea for *all* misdemeanor offenses—including the most serious misdemeanor offenses, such as certain sex offenses involving adult and child victims, domestic violence, stalking, and voyeurism. To guide our diversion, we have detailed internal guidelines for which defendants are eligible for

these diversions (which helps ensure similarly situated defendants are treated the same) and the types of diversion opportunities that should be available for a particular defendant. In short, we have a standardized system for identifying defendants who could benefit from diversion and then offering them the most appropriate diversion opportunity. By contrast, there have been no developed guidelines regarding the implementation of judicially led diversion, including what types of diversion may be most appropriate for a particular defendant or case. We want to ensure that our pre-trial diversion program is robust, allowing for the most appropriate plea agreement or diversion opportunity, and creating consistency between cases; this proposal may undermine our ability to accomplish that goal.

Universal Second Look

The RCCA proposes expanding the Second Look (also known as IRAA/Incarceration Reduction Amendment Act) provisions to allow any person—regardless of their age at the time of the offense—to petition the court for review of their sentence after the person has been incarcerated for 15 years. *See* RCCA Amendments to D.C. Code § 24-403.03.

We recommend that the Council delay consideration of this proposal. We recognize that the goal of a sentencing review mechanism is to offer second chances, and to ensure that people who have served their time have opportunities for rehabilitation and reentry. This proposal, however, would expand second look review from current law, which was significantly expanded by the Council earlier this year. Based on data obtained from the Federal Bureau of Prisons (BOP) this past summer, there are currently 460 people in the custody of BOP who became immediately eligible to apply for a sentence reduction as a result of the recently enacted Second Look Act, which allowed a person who was between 18 and 24 years old at the time they committed an offense and who has served 15 years' incarceration to move for release. Expanding the current IRAA to permit a universal second look would allow an additional 335 individuals in the custody of BOP who were 25 or older at the time of their offense and have served 15 years' incarceration to immediately move for release. Given that this pool of eligible individuals was so recently expanded, we encourage the Council to delay further consideration of any additional expansion. Before any additional expansion, we should review the impacts of this expansion, including offenses—particularly violent offenses—committed by people released under this provision, the impact that this expansion has had on victims and their families, the supports available to assist victims with navigating this process, and the supports available to assist individuals released under this provision with reentry and reintegration to society.

Concerns with Substantive Criminal Law Proposals Under the Revised Criminal Code Act

Burglary Penalties

The RCCA proposes creating three gradations of Burglary. First Degree Burglary—which requires that a victim directly perceive the defendant inside a dwelling—would be punishable by a maximum of 4 years' incarceration, and Enhanced First Degree Burglary—

committed with a firearm or dangerous weapon—would be punishable by a maximum of 8 years' incarceration.[1] *See* RCCA § 22A-3801.

However, the RCCA's proposed maximum penalties for First Degree Burglary and Enhanced First Degree Burglary do not adequately account for the harms and trauma that can be incurred by what is, in essence, a home invasion. A statutory maximum does not represent the legislature's sense of what the minimum amount, or even average amount, of punishment associated with a crime should entail. Rather, a statutory maximum—by definition—reflects the legislature's belief as to what a person should be sentenced to for committing the worst possible version of that offense. Homes are where people live, where they keep their children safe, where they store their most valuable and sentimental possessions, and where they feel most secure. A burglary can shatter this sense of security, sometimes irrevocably. The maximum penalty for this crime, therefore, should recognize that a burglary violates the sanctity of the home, and the maximum penalty should be increased so that it is commensurate with the harms that can be caused by this type of invasion. Notably, the District's Sentencing Guidelines categorize First Degree Burglary as a Group 5 offense—a person convicted of this offense with the lowest criminal history would face a guideline range of between 3 and 7 years in prison; a person convicted of this offense with the highest criminal history would face a guideline range of 7 years or more in prison. The Guidelines categorize First Degree Burglary While Armed as a Group 3 offense—a person convicted of this offense with the lowest criminal history would face a guideline range of between 7.5 and 15 years in prison; a person convicted of this offense with the highest criminal history would face a guideline range of 11.5 years or more in prison. The RCCA proposal represents an unwarranted departure.

Robbery and Carjacking Penalties

The RCCA proposes creating three gradations of Robbery, depending on the level of bodily injury suffered by the victim, and the type of property that was involved. A robbery that did not result in serious or significant bodily injury, and where the property taken was valued at less than $5,000, would be categorized as Third Degree Robbery, with a statutory maximum of 2 years' incarceration. Committing this offense while armed with a firearm would be categorized as Enhanced Third Degree Robbery, with a statutory maximum of 4 years' incarceration, with a higher maximum penalty if the firearm actually caused bodily injury to the victim. The RCCA also proposes subsuming the offense of Carjacking into Robbery. Unarmed Carjacking would be categorized as Second Degree Robbery, with a statutory maximum of 4 years' incarceration, and Armed Carjacking would be categorized as Enhanced Second Degree Robbery, with a statutory maximum of 8 years' incarceration. *See* RCCA § 22A-2201.

While we could support reductions in the maximum penalties for these offenses, the proposed reductions are simply too great. The maximum penalty for Carjacking should recognize that Carjacking is akin to burglary in some ways, as it may involve a traumatic intrusion into a

[1] Because the RCCA proposes removing the requirement in current law that, at the time of sentencing, a period of incarceration be reserved as back-up time under D.C. Code § 24-403.01(b-1), these RCCA maximum penalties correspond to maximums of 5 years' and 10 years' incarceration, respectively, under current law.

person's personal and presumed secure space.[2] It also results in the loss of what is often a much more significant asset than is lost in another form of robbery. Further, the proposed maximum penalties for Robbery and Enhanced Robbery are insufficient to account for the harms that can be incurred in a robbery, particularly where the robbery is committed while armed with a dangerous weapon. For example, under the RCCA proposal, both a defendant who held a gun to a victim's head and threatened to kill the victim in connection with a robbery and a defendant who fired a gun indiscriminately at a victim, but did not hit the victim because of bad aim, could each be sentenced to a maximum of 4 years' incarceration for that offense. A maximum possible sentence of 4 years' incarceration would be woefully inadequate for such conduct. Notably, the District's Sentencing Guidelines categorize Robbery as a Group 6 offense—a person convicted of this offense with the lowest criminal history would face a guideline range of between 1.5 and 5 years; a person convicted of this offense with the highest criminal history would face a guideline range of 3.5 years or more in prison. The Guidelines categorize Armed Robbery as a Group 5 offense—a person convicted of this offense with the lowest criminal history would face a guideline range of between 3 and 7 years in prison; a person convicted of this offense with the highest criminal history would face a guideline range of 7 years or more in prison. The RCCA's proposed departure is unwarranted.

Felony Murder

The RCCA proposes eliminating accomplice liability for felony murder. *See* RCCA § 22A-2101(g). The RCCA also proposes requiring that, for felony murder, the lethal act be committed "in the course of and in furtherance of committing or attempting to commit" the predicate offense, and proposes limiting the predicate offenses for felony murder from current law, including eliminating certain types of child physical abuse and other serious crimes as potential predicates for a felony murder conviction. *See* RCCA § 22A-2101(b)(3).

However, we recommend that, with respect to accomplice liability, the Council adopt a compromise position, and create an affirmative defense to felony murder. Under this affirmative defense, a defendant would not be liable for felony murder if the defendant could prove that they did not commit the lethal act, and either believed no participant in the predicate felony offense intended to cause death or serious bodily injury, or made reasonable efforts to prevent another participant from causing the death or serious bodily injury of another. Notably, creating such an affirmative defense is consistent with a previous recommendation of the CCRC. This compromise position recognizes that accomplice liability for felony murder is necessary in many situations because, even where it is possible to prove the identity of the perpetrators of the offense, it is often not possible to identify the specific offender who "commit[ed] the lethal act."

[2] *See, e.g.*, Dan Morse and Luz Lazo, *With Carjackings on the Rise, this Trio of Fed-Up Strangers Intervened*, Washington Post (December 4, 2021) ("For victims, the suddenness of being carjacked can extend out the trauma. One moment, they're in their car—something often associated with contentment, whether it's listening to music or smelling a fresh coffee nestled in the cup holder—the next moment there's a gun or knife stuck in their face, said Christopher Herrmann, an assistant professor at the John Jay College of Criminal Justice in New York. 'It's just as bad, really, as an armed person coming into your house,' Herrmann said. In Montgomery County, victims' advocate Greg Wims has worked with carjacking survivors for nearly 30 years. It can take days or weeks to fully realize the danger they went through. 'Then the thought really hits: I was almost killed over my car,' said Wims, founder of the Victims' Rights Foundation.").

Without some form of accomplice liability, crimes committed by *multiple* perpetrators would escape felony murder liability, while the same offense committed by a *single* perpetrator could result in felony murder liability. For example, a gang rape perpetrated by two or more individuals that resulted in the victim's death may result in no liability for murder, as it may not be possible to determine which defendant committed the lethal act. A father and mother both systematically abusing their child, resulting in the child's death, may result in no liability for murder. Where two individuals fire gunshots at a victim at the same time in the course of an armed robbery or carjacking, and it is impossible to prove which bullet caused the victim's death, there may be no liability for murder. These examples show the necessity of accomplice liability for felony murder in situations where its absence would otherwise mean that neither person responsible for killing someone in the course of what is an inherently dangerous and violent offense is held accountable for murder. In murder cases, unlike for other offenses, the murdered victim cannot provide any information about what happened during the offense. By altering liability for accomplices under a felony murder theory, the RCCA proposal would effectively remove murder liability for certain felony murders committed by groups of perpetrators. Indeed, the more people who commit the predicate offense together, the less likely it would be that liability could attach for felony murder.

Defense to Child Sexual Abuse

The RCCA proposes departing from long-standing District law that mistake of age is not a legal defense to child sexual abuse,[3] and creating an affirmative defense to felony child sexual abuse where: (1) the victim is 14 or 15 years old (or 16 or 17, in the case of sexual abuse by a person in a position of trust or authority); (2) the defendant reasonably believes the victim is 16 or older (or 18 or older, in the case of sexual abuse by a person in a position of trust or authority); and (3) the reasonable belief is based on an oral or written statement that the victim made to the defendant about the victim's age. *See* RCCA § 22A-2302(g)(2)-(3). For less severe forms of child sexual abuse, the government would be required to prove, as an element, that the defendant was reckless as to the victim's age. *See* RCCA § 22A-2304(a)(1)(A) (Sexually suggestive conduct with a minor); RCCA § 22A-2305(a)(2)(A) (Enticing a minor into sexual conduct); RCCA § 22A-2306(a)(2) (Arranging for sexual conduct with a minor or person incapable of consenting).

However, because this defense would allow for the introduction of evidence regarding the defendant's objectively "reasonable belief" as to the age of the victim, the existence of this defense could, practically, create a legally sanctioned justification for the defense to introduce evidence that would otherwise have no probative value at trial. For example, to show an objectively "reasonable belief," the defendant may seek to elicit testimony relating to the child victim's appearance, including the child victim's physical development, maturity, and clothing, or photos of how the child victim presents themselves on social media. This testimony would be elicited to show why the victim appeared to be older than the victim's true age. Allowing evidence of the defendant's "reasonable belief" would allow this type of demeaning and humiliating evidence to be deemed probative and, thus, admissible at trial. If this proposal goes into effect, a defendant may also seek to introduce evidence currently precluded by the Rape

[3] *See* D.C. Code § 22-3011(a).

Shield Law[4] regarding the victim's prior sexual behavior to validate their "reasonable belief" that the child victim was of consenting age. Such evidence could include, for example, the victim's known history of engaging in sexual acts with adults, prior pregnancies or births, involvement in prostitution and/or other sexually related behavior of an adult nature that suggested to the defendant that the victim was of a legally mature age. This evidence is the exact type that exposes the extremely intimate life of the victim (and here, a child victim) that the Rape Shield Law was specifically designed to exclude except in the most unusual cases where the probative value of the evidence is precisely demonstrated. We account for compelling fact patterns in exercising our charging discretion, where—despite the strict liability for this offense—a person may have reasonably believed that the victim was not underage. Allowing for this legal defense, however, may permit the defendant to elicit evidence at trial in a manner that is inappropriate, unnecessarily humiliating for the sexual assault victim, and directly contrary to the compelling policy reasons behind the Rape Shield Law.[5]

Requirement that Certain Sexual Conduct Have a "Sexual" Intent

The RCCA proposes adding the modifier "sexually" to certain conduct before it can constitute a "sexual act" or "sexual contact," such that certain behavior would only constitute a sexual offense if the defendant has a "sexual" intent. *See* RCCA §§ 22A-101(118)(c), 22A-101(119)(B)(ii).[6]

However, adding the modifier "sexually" would constitute an ill-advised change from current law, as it would unduly limit situations where the defendant's conduct should qualify as a sexual act or sexual contact. Sexual violence can be about power and control, *not* sex or sexual gratification. When committing a sexual offense, a defendant may be motivated by a desire to be violent or to assert power over a victim, not necessarily to be sexually aroused. For example, if, at a fraternity or sorority hazing, a defendant publicly penetrated another person with an object, the defendant may not have been acting with a sexual desire, but may have been acting with an intent to abuse, humiliate, harass, or degrade the victim. This would and should constitute a sexual offense. Further, even where a victim clearly experiences a sexual violation, it is often difficult, if not impossible, to prove that a defendant committed the offense for a sexual reason. For example, if a defendant grabs the vagina, breast, or buttocks of a stranger, that victim likely will feel sexually violated, and the conduct should constitute a sexual offense. Absent evidence of the defendant having an erection or outwardly manifesting sexual pleasure through words or actions—which is rare in many cases, particularly those involving sudden, brief, sexual assaults

[4] *See* D.C. Code §§ 22-3021, 3022.

[5] *See Scott v. United States*, 953 A.2d 1082, 1089 (D.C. 2008) (the purpose of the Rape Shield Law is to "safeguard against unwarned invasions of privacy" and "to exclude legally irrelevant evidence that may distract the jury or lead it to discount the complainant's injury because of societal stereotypes and prejudices").

[6] Under the RCCA proposal, a "sexual act" would include: "Penetration, however slight, of the anus or vulva of any person by any body part or by any object, with the desire to *sexually* abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire" (emphasis added). RCCA §§ 22A-101(118)(c). A "sexual contact" would include: "Touching of the clothed or unclothed genitalia, anus, groin, breast, inner thigh, or buttocks of any person: (i) With any clothed or unclothed body part or any object, either directly or through the clothing; and (ii) With the desire to *sexually* abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire" (emphasis added). RCCA § 22A-101(119)(B)(ii).

of strangers—the government may not be able to prove that the defendant's actions were sexually arousing or gratifying. The government, however, would be able to show that, at a minimum, the defendant intended to humiliate, degrade, or harass the victim.

Mandatory Minimums

The RCCA proposes eliminating all mandatory minimum sentences from the D.C. Code. *See* RCCA § 22A-603. While we recognize and agree with the desire to reduce the number of mandatory minimums, we cannot support eliminating them all, and argue that two in particular should remain in light of their direct relation to serious violent crime. First, the 30-year mandatory minimum sentence for premeditated First Degree Murder should be maintained. District law has long provided for a minimum sentence for First Degree Murder, an offense that is uniformly viewed as the most serious offense. Every state has some mandatory minimum for First Degree Murder, and the concern that a mandatory minimum sentence may lead to a disproportionately harsh sentence for a less serious offense does not apply to First Degree Murder. Second, the 5-year mandatory minimum for committing a crime of violence while armed with a firearm should be maintained. Under the RCCA's proposed structure, a 5-year mandatory minimum sentence should attach to an enhancement that involves a dangerous weapon or imitation dangerous weapon, where: (1) the underlying offense is a crime of violence; and (2) the weapon involved was a firearm or imitation firearm. This would attach a mandatory minimum to offenses such as armed carjacking, armed sexual assault, armed robbery, and armed kidnapping, but would not extend a mandatory minimum to drug-related offenses. The presence of any firearm is inherently dangerous and can create a significant risk of violence—including a risk of violence to both intended and unintended victims—and the presence of that firearm during a crime of violence necessitates a proportionate sentence. A minimum sentence reflects the community and the legislature's sense that committing a crime of violence while armed is unacceptable by community standards, and will be penalized accordingly.

* * *

USAO-DC is committed to continuously seeking to improve the criminal law and the criminal justice system in the District, and looks forward to continuing to engage the Council and the community in a discussion of how to make our criminal law more fair and just for all.

U.S. Department of Justice

Matthew M. Graves
United States Attorney

District of Columbia

Judiciary Center
555 Fourth St., N.W.
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December 24, 2021

The Honorable Charles Allen
Chairman
Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Avenue, NW
Suite 110
Washington, DC 20004

Dear Chairman Allen:

The United States Attorney's Office for the District of Columbia (USAO-DC) appreciates the opportunity to submit additional written testimony regarding the "Revised Criminal Code Act of 2021" (RCCA). As we stated at the public hearing on December 16, 2021, we support the goal of reforming the D.C. criminal code to ensure that statutes are clear and consistent, logically ordered, and proportionate in their penalties. In many ways, the RCCA is consistent with that goal, and we appreciate the Council considering these recommendations further. While we were supportive of moving this process forward, however, we believe that there are some substantial remaining issues that should be addressed before the Council takes final action.

USAO-DC was pleased to have participated as a member of the D.C. Criminal Code Reform Commission (CCRC) Advisory Group. As part of our participation, we engaged extensively with the CCRC, including submitting hundreds of pages of written comments on the CCRC's proposals. The CCRC has compiled all comments from all Advisory Group members—including USAO-DC's comments—into Appendix C. We reiterate and incorporate into this written testimony the comments in Appendix C. We also highlight some concerns that we previously raised before the CCRC, and raise some additional concerns.

We look forward to continued discussion and engagement on how to improve our criminal code, and working together to improve our criminal justice system.

Sincerely,

Matthew M. Graves
United States Attorney for the District of Columbia

Provisions that Should Be Disaggregated from the Revised Criminal Code Act

There are several provisions that are not integrally related to the substantive criminal law that the CCRC was tasked with revising. These provisions should be disaggregated from the RCCA and considered on their own merit as separate legislation. A reform of the substantive criminal laws is already a tremendous endeavor that will have a significant impact on the criminal justice system. The RCCA should focus first and foremost on these substantive criminal laws, and the Council should consider these additional procedural provisions—if at all—once the criminal justice system has responded to the RCCA's impacts. Even though we believe that these provisions should be disaggregated from the RCCA, we offer the following concerns.

Expanded Right to a Jury Trial for Misdemeanors

The RCCA proposes dramatically expanding the right to a jury trial for misdemeanor offenses, such that, within several years, all offenses punishable by any period of incarceration would be jury demandable. *See* RCCA Amendments to D.C. Code § 16-705.

We respect the right to a jury in appropriate cases, including all felony cases. Jury demandability requirements for misdemeanors, however, should remain consistent with current law. When considering any changes to the jury demandability provisions, we strongly encourage the Council to closely engage with D.C. Superior Court to understand their resources, their funding, and how any change would both directly impact cases on the criminal dockets and indirectly impact cases on other dockets through the diversion of resources. Given the import of this change, we would encourage the Council to seek testimony on this proposal from D.C. Superior Court. Under non-pandemic court operations, there are approximately 3 to 5 misdemeanor cases scheduled for trial every day in each of the 6 general misdemeanor courtrooms, and approximately 2 trials a day in each of the 2 domestic violence misdemeanor courtrooms (that is, roughly 110 to 170 misdemeanor trials per week). By contrast, there is approximately 1 felony case scheduled for trial every day in each of the 8 felony courtrooms (that is, roughly 40 trials per week), and approximately 1 felony case scheduled for trial per week for the 4 to 5 calendars that handle the most serious felony cases (including sexual abuse and murder). Creating new rights to demand a jury in misdemeanor cases will strain both court and prosecutorial resources. Jury trials typically take longer to complete than bench trials, and must be scheduled farther in advance than bench trials. Consequently, creating additional misdemeanor jury trials would require more judges, more jurors (which would result in D.C. residents being called for jury duty more frequently), and additional prosecutorial resources. Further, felony cases—especially felony cases involving a detained defendant—are typically prioritized for trials in the court system, so it will likely take longer for misdemeanor cases to go to trial, and may affect the timing of felony trials as well. This may result in delayed justice for victims, as victims will invariably need to wait longer for cases to resolve at trial, even in relatively straightforward misdemeanor cases. To our knowledge, no one has begun to analyze what it would take to create the infrastructure to handle a two-to-four-fold increase in the number of scheduled jury trials, what constraints exist that are beyond the District's control (such as the current size of Superior Court), and what delays in justice could ensue from all of these changes.

Given the consequences involved, these issues should be analyzed and discussed before any action is taken.

Importantly, jury demandability under current law is consistent with the constitutional right to a jury. Further, although misdemeanors carry a potential for incarceration, many people convicted of a misdemeanor in the District are not sentenced to any period of incarceration. An increase in the number of jury trials may not only result in delays in jury trials in misdemeanor cases, but also delays in jury trials in felony cases. Given that jury demandability under current law complies with constitutional requirements, and the concern that dramatically expanding jury demandability for misdemeanors may result in delayed justice, the equities balance in favor of remaining consistent with current law.

The Supreme Court has held that it is "appropriate to presume for purposes of the Sixth Amendment that society views [an offense carrying a maximum prison term of six months or less] as 'petty.' A defendant is entitled to a jury trial in such circumstances only if he can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one." *Blanton v. City of N. Las Vegas*, 489 U.S. 538, 543 (1989). The D.C. Court of Appeals has held: "An offense is considered 'petty' if it is punishable by a sentence of no more than 180 days of incarceration. In order to be entitled to a jury trial for a 'petty' offense, a defendant must show that any additional penalties (i.e., penalties other than incarceration) 'are so severe that they clearly reflect a legislative determination that the offense in question is a serious one.'" *Thomas v. United States*, 942 A.2d 1180, 1186 (D.C. 2008) (citing to *Blanton*, 489 U.S. at 541; *Smith v. United States*, 768 A.2d 577, 579 (D.C. 2001); *Foote v. United States*, 670 A.2d 366, 371 (D.C. 1996)).[1] The D.C. Council has already balanced the defendant's interests with the judicial process efficiency interests, and the RCCA should remain consistent with this previously legislated balance.

When the Council has considered this question in the past, Fred B. Ugast, then-Chief Judge of the D.C. Superior Court, stated the following regarding misdemeanor streamlining provisions:

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[1] In *Thomas*, the D.C. Court of Appeals held that there is no right to a jury for the charge of misdemeanor child sexual abuse, finding that "[sex offender registration] is a remedial regulatory enactment, not a penal law, that was adopted to protect the community, especially minors, from the threat of recidivism posed by sex offenders who have been released into the community. Because registration with SORA is an administrative requirement and not penal in nature, we conclude that the Sixth Amendment does not require that we divert in this case from the statute that calls for jury trial in only these cases where the maximum penalty exceeds 180 days." 942 A.2d at 1186 (citation omitted).

The *en banc* D.C. Court of Appeals has addressed the question of "whether the Sixth Amendment guarantees a right to a jury trial to an accused who faces the penalty of removal/deportation as a result of a criminal conviction for an offense that is punishable by incarceration for up to 180 days," holding that "the penalty of deportation, when viewed together with a maximum period of incarceration that does not exceed six months, overcomes the presumption that the offense is petty and triggers the Sixth Amendment right to a trial by jury." *Bado v. United States*, 186 A.2d 1243, 1246-47 (D.C. 2018) (*en banc*).

Last year, the Council passed an amendment to D.C. Code § 16-705(b)(1) providing for the right to a trial by jury in criminal cases where the maximum penalty exceeds 180 days incarceration or a fine of $1000 (up from 90 days and $300). Because the vast majority of charged misdemeanors currently have maximum penalties of one year, the amendment has not significantly reduced the number of jury trials in misdemeanor cases. Bill [10]-268 and Title V of Bill 10-98 would reduce the maximum penalty of most commonly charged misdemeanors from one year to 180 days and to a fine that does not exceed $1000, thereby eliminating the defendant's entitlement to a trial by jury.

In 1992, the Superior Court disposed of 25,034 misdemeanor cases brought by the United States and the District of Columbia (including cases "no papered" and nolle prossed by the prosecutor). Our best estimate is that at least 20,000 of these cases were jury demandable misdemeanors, for which we have maintained six calendars, each presided over by an associate judge and with between 500 and 600 active cases at any given time. Since 1989, there has been a steady growth in U.S. misdemeanor filings: 13,515 cases were brought in 1989; 17,260 cases were brought in 1992. Given limited judicial resources in light of court-wide demands, it should be obvious that the pressure on these six calendars has become enormous and appears to be growing. As a practical matter, the actual number of misdemeanor jury trials is relatively small and the vast majority of cases is disposed of short of trial. However, carrying a case in which a jury demand has been made and readying it for trial by jury take[s] significantly longer than the comparable time for non jury matters.

Enactment of the revised penalty structure would have little or no effect on the sentences actually imposed on misdemeanants. Notwithstanding one-year maximums now applicable to most misdemeanor offenses, first, even second, and, sometimes, third-time offenders are generally sentenced to probation or incarceration under 180 days. Thus, the reduction in sentence maximums is little more than a reflection of current realities. However, the proposed changes would have a significant impact on the Court's ability to manage these calendars and deploy its judicial resources. They would permit the Court to schedule more trials on earlier dates, given the elimination of lengthier jury trials; to reduce court-wide jury costs by nearly $200,000 a year; and, of course, to assign commissioners to some or all of these calendars, thereby freeing up judges to handle the more serious and complex felony cases.

In the final analysis, it is, of course, a question of legislative policy whether persons charged with misdemeanor violations should be afforded a jury trial. Suffice it to note from the Court's point of view, the proposed downgrading of misdemeanor penalties and resultant elimination of jury trials would not adversely affect the quality of justice while, at the same time, it would significantly improve the Court's ability to deliver prompt justice in both misdemeanor and felony cases.

Letter from Fred B. Ugast, Chief Judge, Superior Court of the District of Columbia, to Councilmember James E. Nathanson, Chair, Judiciary Committee, Council of the District of

Columbia, Re: Bill 10-98, "Omnibus Criminal Justice Reform Act of 1993"; Bill 10-268, "Misdemeanor Streamlining Amendment Act of 1993" (Sept. 20, 1993).

The Omnibus Criminal Justice Reform Amendment Act of 1994, D.C. Law 10-151 (eff. Aug. 20, 1994) had the stated purpose of "reduc[ing] the length of sentence for various crimes to make them non-jury demandable." Council for the District of Columbia, Committee on the Judiciary, Report on Bill 10-98, at 3 (Jan. 26, 1994). The Committee Report states: "Both the Superior Court and the U.S. Attorney support this change to allow for efficiencies in the judicial process. While there would be no actual monetary savings, this change will relieve pressure on current misdemeanor calendars, allow for more cases to be heard by hearing commissioners, and allow more felony trials to be scheduled at an earlier date." Committee Report at 4.

Regarding the Misdemeanor Jury Trial Act of 2001, B14-2,[2] Rufus G. King III, then-Chief Judge of the D.C. Superior Court, stated the following:

> This bill would have a significant impact on a number of aspects of courthouse procedure and hence I felt it important to bring those to your attention.
>
> The U.S. Supreme Court and the D.C. Court of Appeals have both found that there is no constitutional right to a jury trial for misdemeanor offenses punishable by less than six months imprisonment, even when a case involves multiple misdemeanor charges such that the aggregate sentence may exceed six months. This bill would provide a right to a jury trial for those being prosecuted in the District of Columbia on multiple misdemeanor counts if the aggregate penalty exceeded 180 days. The majority of misdemeanants in D.C. are charged with a single count in which the penalty does not exceed 180 days. However more than 38% of the misdemeanor cases tried by the D.C. U.S. Attorney's Office involve multiple misdemeanor charges. While the bulk of these cases (well over 90%) involve only 2 or 3 misdemeanor counts, the majority would become "jury demandable" because of the possibility of a sentence of more than 180 days.
>
> The Court's concern is the toll this would take on juror and judicial resources. The Court has recently begun implementation of a jury duty enforcement program, to achieve better compliance with its jury summonses and expand the number of available jurors. Over the past few years the Court has enhanced its jurors' lounge and added a "quiet room" with modems for those who want to use their computers while awaiting jury service. Child care is available to all jurors free of charge, in the courthouse itself. In addition, the Court now uses not just voting rolls and lists from the Motor Vehicle Bureau, but also culls potential juror names and addresses from unemployment compensation and public assistance lists, as well as the Department of Revenue rolls. All

[2] As introduced, this bill proposed that, where a defendant is charged with more than one offense, and the cumulative maximum penalty is a fine of more than $1,000 or incarceration for more than 180 days, the defendant may demand a jury trial. As enacted, this law limited jury demandability to cases where a defendant is charged with multiple misdemeanor offenses if the cumulative maximum penalty is a fine of more than $4,000 or incarceration for more than two years.

these efforts have been made to ensure that more D.C. residents voluntarily participate in jury service, that all eligible residents share the responsibility of jury duty and thus that the Court can maintain its current rule requiring jury service no more than once every two years. The Court's assumption is that most defendants would opt for a jury trial if they had the right to demand one. Additional misdemeanor jury trials would put those cases in competition with felonies for available jurors. The Court estimates it would have to summon an additional 8,000 jurors per year to handle the additional misdemeanor jury trials. This increase could result in the Court having to summon jurors more frequently than every two years as provided in the current jury plan.

This legislation would also result in significantly more judicial time spent on these multiple count misdemeanor cases. Jury trials for minor criminal matters take a day and a half to two days, sometimes longer. Bench trials—the current practice for multiple count misdemeanor cases—typically take between two and four hours. The legislation would dramatically increase the number of jury trials and thus mean each judge would be able to resolve many fewer cases per month. The result would be a longer time between arrest and trial and a realignment of Criminal Division resources from felonies to misdemeanors. To the extent that the 38% of misdemeanor cases prosecuted by the U.S. Attorney's Office become jury trials, there would be a need for more judges handling misdemeanor calendars. The Court estimates that there would be an additional 300 jury trials per year. The Court is currently working with Congress on a reform of its Family Division, and Congress has made clear that additional resources and judges are needed for that crucial work. This bill would result in a further depletion of the resources from other Divisions in order to handle the new jury trials in multiple count misdemeanor cases.

The Court is currently involved in a major effort to establish a case management plan that would bring it into compliance with case processing guidelines concerning timeliness that have been established by the American Bar Association. An increase of 300 additional misdemeanor jury trials would have a significant impact on the Court's ability to meet the ABA's guideline of disposing of 90% of misdemeanor cases within 90 days and 100% within 100 days. These guidelines are a performance measure that the Court is committed to meeting; without additional judges (and jurors), it would be practically impossible to meet these goals with an increased number of misdemeanor jury trials.

It is important to note that the vast majority—well over 90%—of multi-count misdemeanor cases involve just two or three counts, and thus the maximum possible penalty, which is rarely imposed, is less than eighteen months. Over 97% of those sentenced in 2000 received 180 days or less; less than a tenth of one percent of the defendants received a sentence of two years or more.

Most of multi-count misdemeanor cases involve allegations of possession of two or more drugs, possession of drugs when committing another offense, or a domestic violence incident leading to charges of assault along with a weapons charge or a civil

> protection order. The Court is concerned that scarce judicial resources would be diverted from more serious felony trials or from Family Court to try misdemeanor jury trials where only 3% (fewer than 84 individuals) were sentenced to more than 180 days in jail.

Testimony of Chief Judge Rufus G. King III on Behalf of the D.C. Superior Court Before the Judiciary Committee of the D.C. Council (Oct. 12, 2001).

Roscoe C. Howard, Jr., then-U.S. Attorney for the District of Columbia stated that, as a result of the Omnibus Criminal Justice Reform Act of 1994:

> Misdemeanor cases which used to languish up to a year or more are now set for trial within 2 to 3 months of arrest. Instead of taking a few days to try, they take a few hours. This means that a judge might be able to resolve several cases in the same amount of time that it would take a jury to decide one case. Moreover, the certainty of going to trial as scheduled spurs many pleas. The District of Columbia is better served by a more expeditious trial system, which enables victims to return to their lives, and defendants to either get on with their sentence (which usually does not entail jail time for misdemeanors) or, by an acquittal, to put the matter behind them.

Statement of United States Attorney Roscoe C. Howard, Jr. on Bill 14-2, the "Misdemeanor Jury Trial Act of 2001," Committee on the Judiciary, Council of the District of Columbia (Oct. 12, 2001).

The Committee Report to the Misdemeanor Jury Trial Act of 2001 stated:

> As Councilmember Phil Mendelson noted at the Committee hearing on October 12, 2001, the "right to trial by jury [is] a fundamental right. It is fundamental to the American scheme of justice, [and] it is so fundamental that this right appears in not one, but two places in the United States Constitution." While the U.S. Supreme Court has held that it is permissible to aggregate misdemeanor penalties without violating the Sixth Amendment, the Committee has determined that, as a matter of public policy, there should be limits placed on the amount of time a person can be imprisoned without the right to a jury trial. The threshold for a jury demandable offense was set at two years in order to balance the interests of justice and fairness to the defendant with the efficiency of the judicial process.

Council for the District of Columbia, Committee on the Judiciary, Report on Bill 14-2, at 1–2 (Nov. 21, 2001).

In 2009, Chief Judge Satterfield sent a letter to Vincent Gray, then the Chairman of the D.C. Council, regarding Bill 18-138, the Omnibus Anti-Crime Amendment Act of 2009. The provisions discussed in that letter were ultimately incorporated in Bill 18-151 (Law 18-88), the Public Safety and Justice Amendments Act of 2009, which made the offense of unlawful entry onto private property non-jury demandable. In his letter, Chief Judge Satterfield wrote the following:

> I am writing to alert you about the impact on judicial administration of Bill 18-138, the Omnibus Anti-Crime Amendment Act of 2009. Section 204(b) of the Act amends the penalty for the crime of unlawful entry by providing for imprisonment of not more than 180 days for unlawful entry on private property, while retaining the penalty of up to six months imprisonment for unlawful entry on public property.
>
> Treating every unlawful entry as a 180 days offense would decrease the burden of these cases on the already beleaguered jury pool in the District of Columbia. The current yield to juror summonses in the District of Columbia is approximately twenty-two percent of all the summonses sent. Although improvements have been taken and are being sought to increase that yield, it is still a fairly small number of citizens who are available to serve. As a result, citizens who respond to this civic duty are routinely called to serve every two years. Figures provided by the Jury Office show that in the last two years, a majority of jurors were summoned as soon as two years had lapsed from their last summons date. Judges in the Superior Court commonly hear complaints from residents that calls to District jury service are far more frequent than those from other jurisdictions. Further, our jurisdiction is unique in the jury service burdens it puts on its citizens, since the federal court draws its jury pool from the same municipal pool of citizens as the Superior Court. Drawing jurors from this limited pool for six month offenses makes it more difficult for the Court to maintain the necessary supply of jurors for the serious felony cases.

Letter from Lee F. Satterfield, Chief Judge, Superior Court of the District of Columbia, to Vincent Gray, Chairman, Council of the District of Columbia, Re: Bill 18-138, "Omnibus Anti-Crime Amendment Act of 2009" (March 18, 2009).[3]

In sum, USAO-DC recommends that jury demandability for misdemeanors remain consistent with current law, and that the Council closely engage with D.C. Superior Court before making any change to the law.

Deferred Dispositions for Misdemeanors

The RCCA proposes that, for *every* misdemeanor, when a defendant is found guilty of the offense, the court may defer further proceedings and place a defendant on probation before judgment for a period not to exceed one year. Under the proposal, if the defendant does not violate any of the conditions of probation, the court "shall" dismiss the proceedings. Following a

[3] Chief Judge Satterfield wrote a similar letter on March 18, 2009, to Phil Mendelson, then the Chairman of the Committee on Public Safety and the Judiciary, discussing the impact on judicial administration of Bill 18-151, the Public Safety and Justice Amendments Act of 2009. That letter discussed concerns regarding the proposal to make disorderly conduct punishable by 6 months' incarceration, rather than 180 days' incarceration, which would create a similar burden on the jury pool in the District.

dismissal, the defendant may move to seal the arrest and court proceedings. *See* RCCA § 22A-602(c).

We support the desire to expand diversion for low-level offenses, in recognition that a conviction may not be the most fair and just result in all cases. Consistent with that recognition, we have been working to expand our pre-trial diversion program with the goal of maximizing public safety, reducing recidivism, and enhancing a fair and efficient criminal justice system. The RCCA proposal, however, would allow judicially crafted diversion *after* a trial or guilty plea for *all* misdemeanor offenses—including the most serious misdemeanor offenses, such as certain sexual offenses involving adult and child victims, domestic violence, stalking, and voyeurism. To guide our diversion, we have detailed internal guidelines for which defendants are eligible for these diversions (which helps ensure similarly situated defendants are treated the same) and the types of diversion opportunities that should be available for a particular defendant. In short, we have a standardized system for identifying defendants who could benefit from diversion and then offering them the most appropriate diversion opportunity. By contrast, there have been no developed guidelines regarding the implementation of judicially led diversion, including what types of diversion may be most appropriate for a particular defendant or case. We want to ensure that our pre-trial diversion program is robust, allowing for the most appropriate plea agreement or diversion opportunity, and creating consistency between cases; this proposal may undermine our ability to accomplish that goal.

Universal Second Look

The RCCA proposes expanding the Second Look (also known as IRAA/Incarceration Reduction Amendment Act) provisions to allow any person—regardless of their age at the time of the offense—to petition the court for review of their sentence after the person has been incarcerated for 15 years. *See* RCCA Amendments to D.C. Code § 24-403.03.

We recommend that the Council delay consideration of this proposal. We recognize that the goal of a sentencing review mechanism is to offer second chances, and to ensure that people who have served their time have opportunities for rehabilitation and reentry. This proposal, however, would expand second look review from current law, which was significantly expanded by the Council earlier this year. Based on data obtained from the Federal Bureau of Prisons (BOP) this past summer, there are currently 460 people in the custody of BOP who became immediately eligible to apply for a sentence reduction as a result of the recently enacted Second Look Act, which allowed a person who was between 18 and 24 years old at the time they committed an offense and who has served 15 years' incarceration to move for release. Expanding the current IRAA to permit a universal second look would allow an additional 335 individuals in the custody of BOP who were 25 or older at the time of their offense and have served 15 years' incarceration to immediately move for release. Given that this pool of eligible individuals was so recently expanded, we encourage the Council to delay further consideration of any additional expansion. Before any additional expansion, we should review the impacts of this expansion, including offenses—particularly violent offenses—committed by people released under this provision, the impact that this expansion has had on victims and their families, the supports

available to assist victims with navigating this process, and the supports available to assist individuals released under this provision with reentry and reintegration to society.

Revised Criminal Code Act Penalties

In our prepared remarks before the Judiciary Committee on December 16, 2021, we highlighted some significant concerns with the proposed penalties under the RCCA. Additional discussion of those proposed penalties is below, along with concerns about additional penalty provisions.

Burglary

The RCCA proposes creating three gradations of Burglary. First Degree Burglary—which requires that a victim directly perceive the defendant inside a dwelling—would be punishable by a maximum of 4 years' incarceration, and Enhanced First Degree Burglary—committed with a firearm or dangerous weapon—would be punishable by a maximum of 8 years' incarceration.[4] *See* RCCA § 22A-3801.

However, the RCCA's proposed maximum penalties for First Degree Burglary and Enhanced First Degree Burglary do not adequately account for the harms and trauma that can be incurred by what is, in essence, a home invasion. A statutory maximum does not represent the legislature's sense of what the minimum amount, or even average amount, of punishment associated with a crime should entail. Rather, a statutory maximum—by definition—reflects the legislature's belief as to what a person should be sentenced to for committing the *worst* possible version of that offense. Homes are where people live, where they keep their children safe, where they sleep, where they store their most valuable and sentimental possessions, and where they feel

[4] The RCCA proposes removing the requirement in felony cases that a period of incarceration be reserved as back-up time under D.C. Code § 24-403.01(b-1). Under current law, for example, a defendant sentenced to an offense with a maximum penalty of 10 years' incarceration can only be sentenced to 8 years' incarceration at the time of the original sentencing, as the judge is required to reserve 2 years of back-up time in the event that the defendant violates the terms of supervised release. Under the RCCA proposal, a judge could impose the maximum penalty at the time of the original sentencing; the RCCA separately provides for an additional period of incarceration for a violation of the terms of supervised release. Thus, where the RCCA proposes a maximum penalty of 8 years' incarceration, that corresponds to a maximum penalty of 10 years' incarceration under current law, as the RCCA would separately provide 2 years' back-up time. This chart shows all corresponding penalties:

Felony Level	*RCCA Penalty*	*RCCA Back-Up Time*	*Corresponding Penalty Under Current D.C. Code*
Class 1 felony	45 years	5 years	50 years
Class 2 felony	40 years	5 years	45 years
Class 3 felony	30 years	3 years	33 years
Class 4 felony	24 years	3 years	27 years
Class 5 felony	18 years	2 years	20 years
Class 6 felony	12 years	2 years	14 years
Class 7 felony	8 years	2 years	10 years
Class 8 felony	4 years	1 year	5 years
Class 9 felony	2 years	1 year	3 years

most secure. A burglary can shatter this sense of security, sometimes irrevocably. The maximum penalty for this crime, therefore, should recognize that a burglary violates the sanctity of the home, and the maximum penalty should be increased so that it is commensurate with the harms that can be caused by this type of invasion.

Notably, the District's Sentencing Guidelines categorize First Degree Burglary as a Group 5 offense—a person convicted of this offense with the lowest criminal history would face a guideline range of between 3 and 7 years in prison; a person convicted of this offense with the highest criminal history would face a guideline range of 7 years or more in prison. The Guidelines categorize First Degree Burglary While Armed as a Group 3 offense—a person convicted of this offense with the lowest criminal history would face a guideline range of between 7.5 and 15 years in prison; a person convicted of this offense with the highest criminal history would face a guideline range of 11.5 years or more in prison. Under current law, First Degree Burglary is subject to a statutory maximum of 30 years' incarceration, and Armed First Degree Burglary is subject to a statutory maximum of 60 years' incarceration. D.C. Code §§ 22-801; 22-4502. The RCCA proposal represents an unwarranted departure from current law and guidelines, and does not adequately reflect the seriousness of home invasions.

Research on the impacts of burglary provides:

> Burglary is a severe form of intrusion and a violation of one's safe territory and sense of security and intimacy. Consequently, victims can experience considerable adverse psychological effects such as anxiety, depression, shock, anger, fear, sleeplessness, exhaustion, and confusion. One study showed that 1 or 2 weeks after the burglary, victims reported a higher level of the preceding psychological distress than those who had not been burgled (the control group). One month after the crime, although they showed improvement in these distress outcomes, their levels remained worse than the control group. These victims have also been shown to experience more distress than those of other property crimes and feel a need to seek medical help from general practitioners.
>
> One study, based on a small sample size ($N = 20$), showed that 1 and 6 months following burglary, victims manifested persistent posttraumatic stress reactions. To our knowledge, this is the only study that has suggested a link between a burglary experience and posttraumatic stress symptoms. Victims found themselves regularly having intrusive thoughts about the burglary. Such intrusion induced a great deal of distress, sadness, and negative feelings. They also found themselves having to avoid thoughts and feeling related to the burglary. This study and the present one are not, however, examining posttraumatic stress disorder (PTSD). This is because to meet the basis criteria for PTSD, victims of burglary need to have experience actual or threatened death or serious injury or a threat to the physical integrity of oneself of others during the burglary. Many of these victims never confronted the burglars or were assaulted by them. Nevertheless, they

could still experience the posttraumatic stress symptoms described earlier, despite the fact that they had not met the basis criteria for PTSD."[5]

Further, the CCRC conducted a public opinion survey, located in Appendix I. The survey asked respondents to rate the seriousness of each hypothetical criminal act on a scale of 0 to 12, with 0 being the least severe, and 12 the most severe. The survey also provided several key "milestones" based on examples of conduct for severity levels 12, 10, 8, 6, 4, 2, and 0:

- Milestone 12: An intentional killing
- Milestone 10: An intentional killing in a moment of extreme emotional distress (e.g. after a loved one was hurt)
- Milestone 8: Serious injury that risks, but does not cause, death (e.g. internal bleeding)
- Milestone 6: Moderate injury requiring immediate medical treatment (e.g., a broken bone)
- Milestone 4: Minor injury treatable at home (e.g. a black eye)
- Milestone 2: Non-painful physical contact (e.g. pushing someone around)
- Milestone 0: Not a crime (e.g., a speeding ticket)

As compiled in Appendix I, Document 1, the following questions relate to the charges of Burglary:

- "Entering an occupied home with intent to cause a serious injury to an occupant, and inflicting such an injury." Mean of 8.5, median of 9.
- "Entering an occupied home intending to steal property while armed with a gun. When confronted by an occupant, the person displays the gun, then flees without causing an injury or stealing anything." Mean of 6.8, median of 7.
- "Entering an occupied home intending to steal property, and causing minor injury to the occupant before fleeing. Nothing is stolen." Mean of 6.1, median of 6.
- "Entering an occupied home intending to steal property, but fleeing without being seen, and without taking anything. The person secretly carried a gun, but never displayed it." Mean of 5, median of 5.
- "Entering an occupied home intending to steal property, but fleeing without being seen, and without taking anything." Mean of 4.3, median of 4.
- "Entering an empty store intending to steal property, but fleeing when an alarm goes off, without taking anything." Mean of 3.7, median of 3.

Although we understand that the intent of the public opinion survey was to allow people to respond in a relatively straightforward manner to basic questions about criminal conduct, the survey is lacking in several respects. The questions focus heavily on the amount of physical

[5] Man Cheun Chung, Jacqui Stedmon, Rachel Hall, Zoe Marks, Kate Thornhill, and Rebecca Mehrshahi, *Posttraumatic Stress Reactions Following Burglary: The Role of Coping and Personality*, Traumatology: An International Journal, Vol. 20, No. 2 (2014) (internal citations omitted). *See also* Alan Beaton, Mark Cook, Mark Kavanagh, and Carla Herrington, *The Psychological Impact of Burglary*, Psychology, Crime & Law, Vol. 6 (2000).

injury sustained, without accounting for emotional injuries that may be sustained (such as post-traumatic stress disorder), even if those injuries are difficult to quantify or are undiagnosed. The questions also may not account for more serious versions of an offense. "Entering an occupied home with intent to cause a serious injury to an occupant, and inflicting such an injury" is ranked at a mean of 8.5 and a median of 9. Under the RCCA proposal, this example would qualify as First Degree Burglary and be punishable by a maximum of 4 years' incarceration, but may also qualify as Second Degree Assault (Aggravated Assault), which is punishable by a maximum of 8 years' incarceration. The other examples in the public opinion survey, however, relate only to intent to steal property, not intent to inflict a lesser harm, or the infliction of more than a "minor injury." Thus, it is hard to ascertain based solely on the public opinion data in Appendix I what the perceived gravity of a more serious version of burglary would be when it is not accompanied by a more serious felony offense. If, for example, a person entered a home and punched an adult victim numerous times in their bed, causing injuries that were consistent with Fourth Degree Assault that did not rise to the level of a "significant bodily injury," and then went into a child's bedroom and inappropriately touched the child's stomach, back, and outer thigh, thus committing the offense of Enhanced Offensive Physical Contact since the touching did not rise to a "sexual contact," that Burglary should be subject to a more substantial punishment, even where the offenses committed within the home are only misdemeanors. USAO-DC recommends that, to account for the most serious versions of the offense, the maximum penalties be increased from the RCCA proposal.

Robbery and Carjacking

The RCCA proposes creating three gradations of Robbery, depending on the level of bodily injury suffered by the victim, and the type of property that was involved. A robbery that resulted in serious bodily injury would be categorized as First Degree Robbery, with a statutory maximum of 12 years' incarceration. A robbery that resulted in significant bodily injury, where the property taken was valued at $5,000 or more, or where the property taken is a motor vehicle would be categorized as Second Degree Robbery, with a statutory maximum of 4 years' incarceration. A robbery that did not result in serious or significant bodily injury, and where the property taken was valued at less than $5,000, would be categorized as Third Degree Robbery, with a statutory maximum of 2 years' incarceration. Committing Third Degree Robbery while armed with a firearm would be categorized as Enhanced Third Degree Robbery, with a statutory maximum of 4 years' incarceration, with a higher maximum penalty if the firearm actually caused bodily injury to the victim. The RCCA also proposes subsuming the offense of Carjacking into Robbery. Unarmed Carjacking would be categorized as Second Degree Robbery, with a statutory maximum of 4 years' incarceration, and Armed Carjacking would be categorized as Enhanced Second Degree Robbery, with a statutory maximum of 8 years' incarceration. *See* RCCA § 22A-2201.

While we could support reductions in the maximum penalties for these offenses, the proposed reductions are simply too great. The maximum penalty for Carjacking should recognize that Carjacking is akin to burglary in some ways, as it may involve a traumatic intrusion into a

person's personal and presumed secure space.[6] It also results in the loss of what is often a much more significant asset than is lost in another form of robbery. Further, the proposed maximum penalties for Robbery and Enhanced Robbery are insufficient to account for the harms that can be incurred in a robbery, particularly where the robbery is committed while armed with a dangerous weapon. For example, under the RCCA proposal, both a defendant who held a gun to a victim's head and threatened to kill the victim in connection with a robbery and a defendant who fired a gun indiscriminately at a victim, but did not hit the victim because of bad aim, could each be sentenced to a maximum of 4 years' incarceration for that offense. A maximum possible sentence of 4 years' incarceration would be woefully inadequate for such conduct.

Notably, the District's Sentencing Guidelines categorize Robbery as a Group 6 offense—a person convicted of this offense with the lowest criminal history would face a guideline range of between 1.5 and 5 years; a person convicted of this offense with the highest criminal history would face a guideline range of 3.5 years or more in prison. The Guidelines categorize Armed Robbery as a Group 5 offense—a person convicted of this offense with the lowest criminal history would face a guideline range of between 3 and 7 years in prison; a person convicted of this offense with the highest criminal history would face a guideline range of 7 years or more in prison. Under current law, Robbery—regardless of the level of injury sustained or the value of the property taken—is subject to a statutory maximum of 15 years' incarceration, and Armed Robbery is subject to a statutory maximum of 45 years' incarceration. D.C. Code §§ 22-2801; 22-4502.

The Guidelines categorize Carjacking as a Group 4 offense—a person convicted of this offense with the lowest criminal history would face a guideline range of between 4 and 10 years in prison; a person convicted of this offense with the highest criminal history would face a guideline range of 8 years or more in prison. The Guidelines categorized Armed Carjacking as a Group 3 offense— a person convicted of this offense with the lowest criminal history would face a guideline range of between 7.5 and 15 years in prison; a person convicted of this offense with the highest criminal history would face a guideline range of 11.5 years or more in prison. Under current law, the statutory maximum for Carjacking is 21 years' incarceration, and the statutory minimum is 7 years' incarceration; the statutory maximum for Armed Carjacking is 40 years' incarceration, but may only exceed 30 years' incarceration if certain aggravating factors are present, and the statutory minimum is 15 years' incarceration. D.C. Code §§ 22-2803; 24-403.01(b-2). The RCCA's proposed departure is unwarranted.

[6] *See, e.g.*, Dan Morse and Luz Lazo, *With Carjackings on the Rise, this Trio of Fed-Up Strangers Intervened*, Washington Post (December 4, 2021) ("For victims, the suddenness of being carjacked can extend out the trauma. One moment, they're in their car—something often associated with contentment, whether it's listening to music or smelling a fresh coffee nestled in the cup holder—the next moment there's a gun or knife stuck in their face, said Christopher Herrmann, an assistant professor at the John Jay College of Criminal Justice in New York. 'It's just as bad, really, as an armed person coming into your house,' Herrmann said. In Montgomery County, victims' advocate Greg Wims has worked with carjacking survivors for nearly 30 years. It can take days or weeks to fully realize the danger they went through. 'Then the thought really hits: I was almost killed over my car,' said Wims, founder of the Victims' Rights Foundation.").

The public opinion survey conducted by the CCRC is relevant to this inquiry as well. As compiled in Appendix I, Document 1, the following questions relate to the charges of Robbery and Carjacking:

- "Robbing someone's wallet by shooting them and causing a life-threatening injury." Mean of 9.5, median of 10.
- "Robbing a store, which results in a security guard shooting and killing a bystander. No one else is injured. Rate the robber's conduct." Mean of 9, median of 10.
- "Serving as a lookout for a robber who unexpectedly shoots and kills a cashier. The lookout believed no one was to be killed. Rate the lookout's conduct." Mean of 7.5, median of 8.
- "Robbing someone's wallet by displaying a gun and threatening to kill them." Mean of 7, median of 8.
- "Robbing a store cashier of $5,000 cash by displaying a gun." Mean of 6.4, median of 7.
- "Pulling the only person in a car out, causing them minor injury, then stealing it." Mean of 6.2, median of 6.
- "Robbing someone's wallet by threatening to kill them. The robber secretly carried, but never displayed, a gun." Mean of 6.2, median of 7.
- "Stealing property (other than a car) worth $5,000." Mean of 6.2, median of 6.
- "Stealing a car worth $5,000." Mean of 6.2, median of 6.
- "Displaying a gun to get the only person in a car out, causing no injury, then stealing it." Mean of 6.1, median of 7.
- "Robbing someone's wallet by punching them, which caused minor injury." Mean of 6, median of 6.
- "Robbing a store cashier of $50 cash by displaying a gun." Mean of 5.6, median of 6.
- "Stealing property worth $5,000." Mean of 5.1, median of 5.

Some of the same concerns exist with the survey questions for robbery and carjacking that are noted above, including that the questions may not account for more serious versions of an offense, and, as noted above, a statutory maximum should reflect the legislature's view of the appropriate sentence for the very worst form of the offense. For example, the survey question "pulling the only person in a car out, causing them minor injury, then stealing it," does not account for a more serious similar fact pattern, such as a situation where an actor pulls the driver of a car out of the car, causing minor injury to the driver, but also pulls out of the car the driver's two young children, causing the children to suffer minor injuries or have nightmares, or where the minor injury to the driver is significant yet does not rise to the level of "significant bodily injury"—such as being punched in the face multiple times or being shot at with a gun and not hit. The survey also does not account for the oftentimes protracted loss of a vehicle following a carjacking. Many victims whose vehicles are taken experience significant hardship, including being unable to self-transport to work. This can put their livelihoods in jeopardy, or may cause them to incur significant financial losses to replace the vehicle, repair a returned but damaged vehicle, or pay for other forms of transportation that are more expensive. In addition, the presence and central role of a vehicle in the course of a carjacking makes that offense inherently more dangerous. Carjackings involve highly stressful situations where the defendant or the

victim could cause serious bodily injury or death, or significant property damage, by the operation of the vehicle either while the victim is attempting to flee from the attack, or when the defendant is trying to secure the vehicle from the victim or flee the scene of the carjacking. These very serious risks may not exist during a different form of robbery.

The responses, however, support USAO-DC's recommendation to increase the penalty for armed robbery. "Robbing someone's wallet by displaying a gun and threatening to kill them" is ranked nearly as highly as Milestone 8, which is akin to Second Degree Assault under the RCCA (Aggravated Assault under current law), with a maximum penalty of 8 years' incarceration. This supports the appropriateness of at least a maximum penalty of 8 years' incarceration for all armed robberies, even where the robbery does not result in bodily injury. To accomplish this, USAO-DC recommends that the penalty enhancement in subsection (e)(5)(A)(ii) increase the penalty classification by two classes, rather than one class. The RCCA proposes increasing the penalty classification for Second and Third Degree Robbery by one class when the actor commits the offense under sub-paragraphs (b)(3)(B), (c)(1)(B), (c)(1)(C), or (c)(1)(D) by using or displaying what is, in fact, a dangerous weapon or imitation dangerous weapon; and by two classes when the actor commits the offense under sub-paragraph (b)(3)(A) or sub-paragraph (c)(1)(A) by recklessly displaying or using what, in fact, is a dangerous weapon. Under this proposal, there would be a two-class increase for Third Degree Robbery where, for example, the defendant hit the victim with the gun to accomplish the robbery, but only a one-class increase for Third Degree Robbery where, for example, a defendant held a gun to a victim's head and threatened to kill the victim in connection with a robbery or a defendant fired a gun indiscriminately at a victim, but did not hit the victim because of bad aim. These offenses, however, are equally serious, and do not merit a distinction in offense level. Rather, there should be a single enhancement that increases the penalty classification by two classes where the defendant used or displayed what, in fact, is a dangerous weapon or imitation dangerous weapon. At a very minimum, a maximum penalty of 8 years' incarceration (rather than 4 years) is appropriate for all armed robberies, and the maximum for carjacking should be increased as well.

Armed Threats

The RCCA creates three gradations of Criminal Threats. First Degree Criminal Threats involves a threat of criminal death, serious bodily injury, sexual act, or confinement, with a statutory maximum of 2 years' incarceration. Second Degree Criminal Threats involves a threat of criminal bodily injury or sexual contact, with a statutory maximum of 180 days' incarceration. Third Degree Criminal Threats involves a threat of criminal loss or damage to property, with a statutory maximum of 60 days' incarceration. There are several penalty enhancements that can apply to this offense, including an enhancement where the actor commits the offense "by displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon." Enhanced First Degree Criminal Threats would be punishable by a maximum of 4 years' incarceration. *See* RCCA § 22A-2203.

However, where a defendant threatens to kill a victim by using a firearm, the maximum penalty should be 8 years' incarceration. The offense of Enhanced First Degree Criminal Threats is akin to the current offense of Assault with a Dangerous Weapon where the assault is based on

an intent to frighten the victim. Under current law, the offense of Assault with a Dangerous Weapon is subject to a statutory maximum of 10 years' incarceration. *See* D.C. Code § 22-402. Under the RCCA, this offense would apply, for example, where a defendant held a gun to a victim's head and threatened to kill that victim, or where a defendant threatened to kill a victim and fired a gun indiscriminately at a victim, but did not hit the victim because of bad aim. Crucially, in the public opinion survey conducted by the CCRC in Appendix I, respondents ranked "threatening to kill someone face-to-face, while displaying a gun," with a mean of 7.7 and a median of 8. This is ranked nearly as highly as Milestone 8, which is akin to Second Degree Assault under the RCCA (Aggravated Assault under current law), with a maximum penalty of 8 years' incarceration. This supports the appropriateness of a maximum penalty of 8 years' incarceration. Even where the gun is not fired, public opinion supports attaching a greater penalty to this offense.

Firearms

In summary, the RCCA proposes the following maximum penalties for firearms:

- Possession of a Prohibited Weapon or Accessory under RCCA § 22A-5103
    - First Degree, with a statutory maximum of 4 years' incarceration, applies to possession of an assault weapon, machine gun, sawed-off shotgun, restricted explosive, or ghost gun.
    - Second Degree, with a statutory maximum of 2 years' incarceration, applies to possession of a firearm silencer, bump stock, or large capacity ammunition feeding device.
- Carrying a Dangerous Weapon under RCCA § 22A-5104
    - First Degree, with a statutory maximum of 4 years' incarceration, applies to—in a place where firearms are prohibited—carrying a firearm (other than a pistol), a pistol without a license to carry, or a restricted explosive outside home or business.
    - Second Degree, with a statutory maximum of 2 years' incarceration, applies to—outside a home, place of business, or land—carrying a firearm (other than a pistol), a pistol without a license to carry, or a restricted explosive.
    - Third Degree, with a statutory maximum of 180 days' incarceration, applies to—outside a home, place of business, or land—carrying a dangerous weapon, with intent to use the weapon to cause death or serious bodily injury.
- Possession of a Dangerous Weapon with Intent to Commit a Crime under RCCA § 22A-5105
    - First Degree, with a statutory maximum of 4 years' incarceration, applies to possession of an object designed to explode or produce uncontained combustion with intent to use it to commit certain criminal offenses.
    - Second Degree, with a statutory maximum of 1 year incarceration, applies to possession of a dangerous weapon or imitation firearm with intent to use it to commit certain offenses.
- Possession of a Dangerous Weapon During a Crime under RCCA § 22A-5106

    - First Degree, with a statutory maximum of 2 years' incarceration, applies to possession of a firearm in furtherance of and while committing certain offenses.
    - Second Degree, with a statutory maximum of 1 year incarceration, applies to possession of an imitation firearm or dangerous weapon in furtherance of and while committing certain offenses.
- Possession of a Firearm by an Unauthorized Person under RCCA § 22A-5107
    - First Degree, with a statutory maximum of 4 years' incarceration, applies to possession of a firearm, with a prior conviction for a crime of violence.
    - Second Degree, with a statutory maximum of 2 years' incarceration, applies to possession of a firearm, with a prior conviction for a felony within 10 years, a firearms offense within 5 years, or an intrafamily offense within 5 years, or while subject to a final civil protection order or anti-stalking order.

Firearm violence is a critical public safety issue, and the firearms that lead to that violence should be penalized accordingly. Indeed, the D.C. Council recently increased the penalty for possessing a large capacity ammunition feeding device from 1 year incarceration to 3 years' incarceration. Firearms Safety Omnibus Amendment Act of 2018, D.C. Law 22-314 (eff. May 10, 2019). In support of that amendment, the Committee on the Judiciary and Public Safety cited to recent mass shootings that involved these high-capacity magazines. Council for the District of Columbia, Committee on the Judiciary and Public Safety, Report on Bill 22-588, at 3–5 (Nov. 28, 2018). The Committee Report also cited to the homicide rate in the District, including the fact that the majority of homicides were committed with a firearm. *Id.* at 5. In increasing this penalty, the Committee found "that the increased lethality of a weapon using a large capacity ammunition feeding device—accomplished through its ability to fire more rounds without reloading—and the resulting threat to the public and law enforcement, warrants a more stringent prohibition on their possession. Court records related to the shooting of Makiyah Wilson revealed that a large capacity ammunition magazine was likely used in the incident. . . . The Committee, therefore, adopts an incremental response on this issue commensurate with the prevalence of the problem in the District and the increased lethality of the devices." *Id.* at 18.

Further, the following public opinion survey questions relate to firearms possession are compiled in Appendix I, Document 1:

- "Possessing at home a machine gun that cannot be legally registered." Mean of 7, median of 8.
- "Carrying a concealed pistol without a license to carry a pistol as required by law while in a school or on a playground. The gun is not involved in any crime." Mean of 6.4, median of 7.
- "Possessing a loaded pistol at home, without registering it as required by law and having been convicted of a violent robbery 15 years ago. The gun is not involved in any crime." Mean of 6.1, median of 6.
- "Carrying a concealed pistol without a license as required by law while walking within 1000 feet (about 3 football fields) of a school or playground. The gun is not involved in any crime." Mean of 5.9, median of 6.

- "Carrying a concealed pistol without a license to carry a pistol as required by law while walking within 300 feet (about 1 football field) of a school or playground. The gun is not involved in any crime." Mean of 5.9, median of 6.
- "Possessing a loaded pistol at home, without registering it as required by law and having been convicted of non-violent distribution of drugs 5 years ago. The gun is not involved in any crime." Mean of 5.8, median of 6.
- "Carrying a concealed pistol while walking down the street without a license to carry a pistol as required by law. The gun is not involved in any crime." Mean of 5.6, median of 5.
- "Possessing a pistol at home, with an appropriate registration certificate, but storing it where a person under 18 may be able to access the weapon." Mean of 5.5, median of 6.
- "Possessing a loaded pistol at home, without registering it as required by law. The gun is not involved in any crime." Mean of 5.4, median of 5.
- "Possessing at home a loaded pistol that hasn't been registered, as required by law, and having been convicted of non-violent distribution of drugs 15 years ago. The gun is not involved in any crime." Mean of 5.4, median of 5.
- "Possessing an unloaded pistol at home, without registering it as required by law. The gun is not involved in any crime." Mean of 5, median of 5.
- "Possessing in one's home a gun after being imprisoned for a serious crime. The gun is not involved in any crime." Mean of 4.7, median of 4.

Possession of a Firearm by an Unauthorized Person

The RCCA's proposed penalties are a significant drop from current penalties. Under current law, a person who has been previously convicted of a felony, intrafamily offense, or is subject to other limitations on firearm possession is subject to a statutory maximum of 10 years' incarceration, and a person who has been previously convicted of a crime of violence is subject to a statutory maximum of 15 years' incarceration. *See* D.C. Code § 22-4503. USAO-DC recommends increasing the proposed RCCA penalties to be more consistent with the penalties under current law.

Individuals convicted of this offense not only carried a firearm, but also had been previously convicted of a felony or crime of domestic violence, or a prior crime of violence. Persons previously convicted of these offenses should not be permitted to carry firearms, or in a position to threaten or harm another person with a firearm. When a person has been previously convicted of a crime of violence, that person has shown that they are willing to engage in a violent act. Thus, it is inherently more dangerous to allow a person who has previously committed a violent crime to possess a firearm. The maximum penalty for this offense should be commensurate to account for this.

Carrying a Dangerous Weapon

Second Degree Carrying a Dangerous Weapon is the equivalent of the current Carrying a Pistol Without a License ("CPWL") statute. Under current law, CPWL has a statutory maximum

of 5 years' incarceration, or a statutory maximum of 10 years' incarceration if the defendant has a previous conviction for CPWL or another felony. *See* D.C. Code § 22-4504. USAO-DC opposes the reduction in the maximum penalty for this offense to only 2 years' incarceration, and recommends that Second Degree Carrying a Dangerous Weapon have a statutory maximum of 4 years' incarceration.

Endangerment with a Firearm

The RCCA proposes creating a felony offense of Endangerment with a Firearm. *See* RCCA § 22A-5120. USAO-DC strongly supports this proposal, and believe that it fills a gap in current law. We agree with the statements in the Commentary that "the revised statute accounts for the distinctly terrifying nature of public shootings that are not otherwise part of a crime against property or persons. The current D.C. Code provides significant liability for possessing or carrying a weapon illegally, irresponsibly, or during a crime but very little additional liability for firing a gun." Commentary on Subtitle V, at 276-77.

The RCCA, however proposes a statutory maximum of 2 years' incarceration for this offense. USAO-DC recommends that the maximum penalty be increased to account for the significant danger created by discharging a firearm—at a very minimum, a maximum penalty of 4 years' incarceration. Even where the defendant does not intend to hit someone, discharging a firearm in a manner that either creates a substantial risk of death or bodily injury to another person, or that is in a location that is open to the general public at the time of the offense is serious conduct that merits a higher maximum penalty.[7]

Murder, Sexual Assault, and Sexual Abuse of a Minor

The RCCA proposes the following maximum sentences for the following offenses: Enhanced First Degree Murder, statutory maximum of 45 years' incarceration; Enhanced Second Degree Murder, statutory maximum of 30 years' incarceration; Enhanced First Degree Sexual Assault, statutory maximum of 30 years' incarceration; Enhanced First Degree Sexual Abuse of a Minor, statutory maximum of 30 years' incarceration; First Degree Sexual Abuse of a Minor, statutory maximum of 24 years' incarceration; Enhanced Second Degree Sexual Abuse of a Minor, statutory maximum of 24 years' incarceration.

USAO-DC recommends, consistent with current law, a maximum sentence of life imprisonment for the RCCA offenses of Enhanced First Degree Murder, Enhanced Second Degree Murder, Enhanced First Degree Sexual Assault, Enhanced First Degree Sexual Abuse of a Minor, First Degree Sexual Abuse of a Minor, and Enhanced Second Degree Sexual Abuse of a Minor. Under current law, First Degree Murder and First Degree Murder While Armed are subject to a 60-year statutory maximum without the presence of aggravating circumstances, and life imprisonment with aggravating circumstances. *See* D.C. Code §§ 22-2104(a); 24-403.01(b-2)(1)–(2). Second Degree Murder and Second Degree Murder While Armed are subject to a 40-year statutory maximum without the presence of aggravating circumstances, and life imprisonment with aggravating circumstances. *See* D.C. Code §§ 22-2014(c); 24-403.01(b-

[7] The public opinion survey in Appendix I does not appear to contain a fact pattern for this offense.

2)(1)–(2). First Degree Sexual Abuse and First Degree Sexual Abuse While Armed are subject to a 30-year statutory maximum without the presence of aggravating circumstances, and life imprisonment with aggravating circumstances. *See* D.C. Code §§ 22-3002; 22-3020; 24-403.01(b-2)(1)–(2). First Degree Child Sexual Abuse and First Degree Child Sexual Abuse While Armed are also subject to a 30-year statutory maximum without the presence of aggravating circumstances, and life imprisonment with aggravating circumstances. *See* D.C. Code §§ 22-3008; 22-3030; 24-403.01(b-2)(1)–(2).

A statutory maximum of life imprisonment never requires a judge to sentence a defendant to life imprisonment. Rather, it recognizes that murder and vaginal, anal, or oral sexual assault involving force or children can be particularly horrific, heinous, or gruesome offenses. A statutory maximum of life imprisonment allows the judge the possibility of sentencing a defendant to life imprisonment in the particularly brutal or most egregious cases in which that is an appropriate sentence. A statutory maximum should reflect the worst possible version of that offense, and allow the judge discretion to impose an appropriate sentence. Although life sentences are imposed infrequently, there are some rare cases in which D.C. Superior Court judges have found it appropriate to impose these sentences in recent years.

Enhanced First Degree Sexual Assault could include particularly gruesome or horrific facts, such as a brutal armed rape against a young child that resulted in serious injuries. A maximum of life imprisonment would allow a judge to use their discretion to impose an appropriate sentence after accounting for the conduct at issue, the defendant's criminal history, the impact on the victim, and any other information that may be relevant.

The RCCA Sexual Abuse of a Minor statute creates six gradations which provide, in summary:

- First Degree: Engaging in a sexual act with a child under 12, where the actor is at least 4 years older than the child
- Second Degree: Engaging in a sexual act with a child under 16, where the actor is at least 4 years older than the child
- Third Degree: Engaging in a sexual act with a minor under 18, where the actor is at least 4 years older than the minor and is in a position of trust with or authority over the minor
- Fourth Degree: Engaging in a sexual contact with a child under 12, where the actor is at least 4 years older than the child
- Fifth Degree: Engaging in a sexual contact with a child under 16, where the actor is at least 4 years older than the child
- Sixth Degree: Engaging in a sexual contact with a minor under 18, where the actor is at least 4 years older than the minor and is in a position of trust with or authority over the minor

The RCCA First Degree Sexual Abuse of a Minor statute is, in effect, an enhanced version of the current First Degree Child Sexual Abuse statute, because it includes, as an element, the enhancement that exists under current law where the victim is under 12 years old. The RCCA

Second Degree Sexual Abuse of a Minor statute essentially tracks the current First Degree Child Sexual Abuse statute, but only applies where the victim is 12 years old or older. Thus, both the RCCA Enhanced First Degree Sexual Abuse of a Minor and the RCCA Enhanced Second Degree Sexual Abuse of a Minor statute are comparable to the current First Degree Child Sexual Abuse Statute with aggravating circumstances, which carries a statutory maximum of life imprisonment. These enhancements can significantly increase the severity of both the RCCA First Degree Sexual Abuse of a Minor statute, and the RCCA Second Degree Sexual Abuse of a Minor statute, and the maximum penalty should account for that. For example, where the defendant is in a position of trust with or authority over the child victim—such as when the victim is being abused by a biological parent or grandparent—that can increase the severity of the offense. Frequently, child sexual abuse is not forced, and would not qualify as a forced sexual assault, because the perpetrator uses various forms of grooming to induce the victim's submission to the sexual acts, and to ensure that the victim remains silent about the abuse to allow the abuse to continue for a prolonged period of time. Non-forced abuse could result in the victim becoming pregnant, contracting a sexually transmitted disease, suffering significant and life-long emotional distress including suicidal thoughts and actions, or various other serious consequences. Non-forced sexual abuse of children can be just as devastating, life-altering, or otherwise deleterious as forced sexual assault, and the statutory maximums between the two offenses should be equal to account for that.[8]

Offensive Physical Contact

The RCCA proposes creating a new offense of Offensive Physical Contact. First Degree applies when a defendant causes a victim to come into physical contact with bodily fluid or excrement and that contact is offensive, with a maximum penalty of 60 days' incarceration. Second Degree applies when a defendant causes a victim to come into physical contact with any person or any object or substance and that contact is offensive, with a maximum penalty of 10 days' incarceration. *See* RCCA § 22A-2204.

[8] USAO-DC further recommends that, at a minimum, Enhanced Second Degree Sexual Abuse of a Minor be increased to a Class 3 felony. Under the RCCA proposal, Second Degree Sexual Abuse of a Minor is a Class 5 felony, and First Degree Sexual Abuse of a Minor is a Class 4 felony. The only distinction between First and Second Degree Sexual Abuse of a Minor is the age of the victim (under 12 years old versus over 12 years old). USAO-DC recommends that the Enhanced version of both of these offenses, however, be classified as a Class 3 felony. Without the enhancement, it is logical to distinguish between conduct involving a child under 12 and conduct involving a child over 12. But an enhancement applies, among other situations, to a situation where the actor is in a position of trust with, or authority over, the victim. If this relationship exists, and the defendant engages in a sexual act with the victim, the defendant should be equally culpable, regardless of whether the victim is under 12 or over 12. For example, if a defendant engages in sexual intercourse with his biological daughter, the defendant should be equally culpable regardless of whether the victim was 11 years old or 13 years old. In both situations, the defendant exploited his position of familial trust and authority over his child, and likely used that trust or authority as a way to cajole the victim into engaging in sexual intercourse. This would also put the Enhanced version of both of these offenses at the same level as Enhanced First Degree Sexual Assault, which is appropriate. Child sexual abuse often occurs without any physical force, so it is appropriate to place the most serious versions of forced assault and non-forced abuse of a child at the same gradation. A perpetrator often uses various forms of grooming to induce the child victim's submission to the sexual acts. Non-forced abuse of a child can often result in short- and long-term physical and emotional harm, both when the child is under 12 or over 12, and should be penalized accordingly.

However, this penalty is insufficient to account for the harms that can be incurred by this offense. USAO-DC recommends increasing the maximum penalty for First Degree to 180 days' incarceration, and the maximum penalty of Second Degree to 60 days' incarceration. First Degree can apply, for example, where a defendant throws feces on a victim, urinates on a victim, or spits on a victim. The harms caused by this offense are similar to the harms caused by Fourth Degree Assault, which requires the infliction of some level of bodily injury. Second Degree can include, for example, non-consensual sexual touching, which, under the RCCA proposal, no longer would qualify as an assault. A non-consensual sexual touching could include an offensive touching of a body part that would not fall under the definition of a "sexual contact," and would thus be ineligible for prosecution as a sexual offense. This could include touching a victim's outer thigh, stomach, lower back, or other similar area of the body. This harm—while potentially less than the harm incurred during a "sexual contact"—should be proportionately penalized.

Stalking

The RCCA proposes that the offense of Stalking have a statutory maximum of 1 year incarceration, and that the offense of Enhanced Stalking have a statutory maximum of 2 years' incarceration. *See* RCCA § 22A-2801. Under current law, Stalking is a misdemeanor subject to a 12-month statutory maximum if there are no aggravating circumstances present, a 5-year statutory maximum if there are certain aggravators present, and a 10-year statutory maximum if the defendant has 2 or more prior convictions for stalking. *See* D.C. Code § 22-3134. USAO-DC recommends that Enhanced Stalking carry a statutory maximum of 4 years' incarceration, rather than 2 years' incarceration. Stalking is serious behavior that can be linked to lethal behavior. The penalty enhancements in the RCCA, including the violation of a no contact order or a previous conviction for stalking, are particularly serious and should be penalized accordingly.[9]

Unauthorized Use of a Motor Vehicle

The RCCA proposes that the offense of Unauthorized Use of a Motor Vehicle (UUV) have a statutory maximum of 1 year incarceration. *See* RCCA § 22A-3203. Under current law, UUV is a felony subject to a 5-year statutory maximum, and a 10-year statutory maximum if the defendant caused the motor vehicle to be taken, used, or operated during the course of or to facilitate a crime of violence. *See* D.C. Code § 22-3215(d). USAO-DC recommends that this offense continue to be a felony, with a maximum of 2 years' incarceration. Notably, theft of a motor vehicle is punishable as Third Degree Theft under RCCA § 22A-3201(c)(4)(B), with a similar maximum of 2 years' incarceration. A vehicle involved in a UUV has frequently been either stolen or carjacked from the victim. Even if the individual involved in the UUV was neither involved in carjacking nor stealing the car, the individual is still participating in harming the victim by using the vehicle without permission. Many victims whose vehicles are taken experience significant hardship, including being unable to self-transport to work. This can put their livelihoods in jeopardy, or may cause them to incur significant financial losses to replace the vehicle, repair a returned but damaged vehicle, or pay for other forms of transportation that are more expensive. Continuing to use a stolen vehicle after it was taken can make it harder for a

[9] The public opinion survey in Appendix I does not appear to contain a fact pattern for this offense.

vehicle to be recovered in a timely fashion, creating additional harm to the victim. Making UUV a felony, with a maximum of 2 years' incarceration, appropriately reflects that continued harm.[10]

Arson

The RCCA creates three gradations of Arson. First Degree, which has a statutory maximum of 18 years' incarceration, applies where a defendant starts a fire or causes an explosion that damages a dwelling or building, where another person is in the dwelling of building, and the fire or explosion causes death or serious bodily injury to another person. Second Degree, which has a statutory maximum of 8 years' incarceration, applies where a defendant starts a fire or causes an explosion that damages a dwelling or building, where another person is in the dwelling of building, regardless of whether another person suffered any level of injury. Third Degree, which has a statutory maximum of 2 years' incarceration, applies where a defendant starts a fire or causes an explosion that damages a dwelling or building, regardless of whether another person is in the dwelling or building. *See* RCCA § 22A-3601.

USAO-DC recommends increasing the maximum penalties for Second Degree and Third Degree. Second Degree can involve significant bodily injury that does not rise to the level of "serious bodily injury" or death. Even where there is minimal injury, there may be extensive trauma that results both from having to evacuate a burning home that was intentionally set on fire, and from the loss of items that may be destroyed by the fire. As to Third Degree, even when a defendant burns a home and there is no person inside, the burning of a dwelling or building can lead to significant damage. A home is a significant financial asset, but is also a significant emotional asset that can have a family's most precious possessions and memories. These memories might include where a child takes their first steps or the last place they saw a beloved family member who has since passed.

Further, the penalties for Second Degree Arson and Third Degree Arson should at least be commensurate with the penalties for First Degree Criminal Damage to Property under RCCA § 22A-3603(a) and First Degree Theft under RCCA § 22A-3201(a). First Degree Criminal Damage to Property involves damaging property without permission and causing $500,000 or more in damage, and is a Class 7 felony punishable by up to 8 years' incarceration. Similarly, First Degree Theft involves the taking, obtaining, transferring, or exercising control over property without the owner's consent and with intent to deprive the owner of the property when the property has a value of $500,000 or more. This is also a Class 7 felony punishable by up to 8 years' incarceration. Houses in the District are regularly worth more than $500,000, and can sometimes be worth much more than that. Starting a fire that consumes a $500,000 house is more dangerous than causing $500,000 worth of damage to a building via other methods; fire is unpredictable and can cause damage to unintended property, including other nearby homes. The penalty for starting such a fire should reflect that dangerousness.

Finally, the following public opinion survey question related to arson is compiled in Appendix I, Document 1:

[10] The public opinion survey in Appendix I does not appear to contain a fact pattern for this offense.

- "Purposely setting an occupied home on fire. No one was injured, and the property damage was less than $5,000." Mean of 6.9, median of 7.

Escape

The RCCA creates three gradations of Escape. First Degree applies where a defendant escapes from a correctional facility, secure juvenile detention facility, or cellblock, and is a felony punishable by a statutory maximum of 4 years' incarceration. Second Degree applies where a defendant escapes from the lawful official custody of a law enforcement officer, and is a misdemeanor punishable by a statutory maximum of 1 year incarceration. Third Degree applies where a defendant escapes from a halfway house or fails to report to a correctional facility, and is a misdemeanor punishable by a statutory maximum of 180 days' incarceration. *See* RCCA § 22A-4401.

USAO-DC does not oppose differentiating between different types of Escape, but recommends that all gradations be felony offenses. Walking away from or failing to return to a halfway house should remain a felony offense, as it currently is. *See* D.C. Code § 22-2601. This is especially true where the underlying offense for which a defendant was sent to the halfway house is itself a felony. The maximum penalty needs to be sufficiently high to incentivize the defendant's compliance with the terms of halfway house placement. The RCCA proposal represents a departure from current law.

Finally, the following public opinion survey questions related to escape are compiled in Appendix I, Document 1:

- "Leaving a halfway house (unlocked detention facility) without legal permission. Mean of 4.8, median of 4.
- "Failing to return to a halfway house (unlocked detention facility) without legal permission. Mean of 4.8, median of 4.

Failure to Appear in Violation of a Court Order, and Failure to Appear after Release on Citation or Bench Warrant Bond

The RCCA proposes that First Degree Failure to Appear in Violation of a Court Order (where the defendant fails to appear in a felony case or at sentencing) be a Class A misdemeanor, punishable by a statutory maximum of 1 year incarceration, and that Second Degree Failure to Appear in Violation of a Court Order (where the defendant fails to appear in a felony or misdemeanor case, or as a material witness) be a Class C misdemeanor, punishable by a statutory maximum of 60 days' incarceration. *See* RCCA Proposed Amendments to D.C. Code § 23-1327. Under current law, the corollary to First Degree is a felony punishable by a statutory maximum of 5 years' incarceration, and the corollary to Second Degree is a misdemeanor punishable by a maximum of 180 days' incarceration. *See* D.C. Code § 23-1327(a).

The RCCA proposes that First Degree Failure to Appear after Release on Citation or Bench Warrant Bond (where the citation or bond is for a felony) be a Class B misdemeanor,

punishable by a maximum of 180 days' incarceration, and that Second Degree Failure to Appear after Release on Citation or Bench Warrant Bond (where the citation or bond is for a misdemeanor) be a Class D misdemeanor, punishable by a maximum of 10 days' incarceration. *See* RCCA Proposed D.C. Code § 23-586. Under current law, the corollary to First Degree is a felony punishable by a statutory maximum of 5 years' incarceration, and the corollary to Second Degree is a misdemeanor punishable by not more than the maximum provided for the offense for which such citation was issued. *See* D.C. Code § 23-585(b).

For both offenses, the maximum penalty needs to be sufficiently high to incentivize the defendant's appearance. If it is too low, a defendant may make a calculation that it is better not to appear and not have to face the consequences of the underlying criminal charge. Of course, a defendant is still accountable for the underlying criminal charge if they fail to appear, but, in certain circumstances, it becomes more difficult for the government to proceed after a defendant has failed to appear. This is particularly true when the defendant has failed to appear for a lengthy time, which may impede the government's ability to locate essential witnesses, and may lead to witnesses' memories fading. USAO-DC therefore recommends increasing the proposed maximum penalties for these offenses.

Finally, the following public opinion survey questions related to failure to appear are compiled in Appendix I, Document 1:

- "Purposely not appearing in court as required by law, when charged with a serious but non-violent criminal offense." Mean of 5.3, median of 5.
- "Purposely not appearing in court as required by law, when charged with a minor, non-violent criminal offense." Mean of 4.7, median of 4.

Trafficking of a Controlled Substance and Trafficking of a Counterfeit Substance

The RCCA offense of Trafficking of a Controlled Substance encompasses conduct that would constitute both Possession with Intent to Distribute a Controlled Substance and Distribution of a Controlled Substance under current law. The RCCA creates five gradations of Trafficking of a Controlled Substance, based on both the type of controlled substance being trafficked, and the quantity of that controlled substance. First Degree—which has a statutory maximum of 8 years' incarceration, Second Degree—which has a statutory maximum of 4 years' incarceration, and Third Degree—which has a statutory maximum of 2 years' incarceration, all apply where the defendant is trafficking what would constitute a "narcotic drug" under current D.C. Code § 48-901.02(15) or an "abusive drug" under current D.C. Code § 48-901.01(26). Fourth Degree—which has a statutory maximum of 1 year incarceration—includes trafficking of any controlled substance listed in Schedule I, II, or III. Fifth Degree—which has a statutory maximum of 180 days' incarceration—includes trafficking of any controlled substance. *See* RCCA Proposed Section 401b.

Although USAO-DC does not oppose multiple gradations of this offense, USAO-DC recommends that all gradations of this offense be felonies. Notably, this offense only applies where the defendant knowingly distributes, manufactures, or possesses with intent to distribute

or manufacture, a measurable quantity of a controlled substance—it does not include possession of a controlled substance for personal use. Trafficking of any controlled substance, regardless of the type of substance, should constitute a felony offense.

USAO-DC recommends that the Council consult closely with an experienced chemist to ascertain what controlled substances are most prevalent in the District, and whether the lists encompassed in First Degree, Second Degree, and Third Degree would encompass those controlled substances. For example, it is unclear whether trafficking of fentanyl or a synthetic cannabinoid would fall within a felony gradation of this offense.[11]

Mandatory Minimums

The RCCA proposes eliminating all mandatory minimum sentences from the D.C. Code. *See* RCCA § 22A-603. While we recognize and agree with the desire to reduce the number of mandatory minimums, we cannot support eliminating them all, and argue that two in particular should remain in light of their direct relation to serious violent crime. First, the 30-year mandatory minimum sentence for premeditated First Degree Murder should be maintained. District law has long provided for a minimum sentence for First Degree Murder, an offense that is uniformly viewed as the most serious offense. Every state has some mandatory minimum for First Degree Murder, and the concern that a mandatory minimum sentence may lead to a disproportionately harsh sentence for a less serious offense does not apply to First Degree Murder. Second, the 5-year mandatory minimum for committing a crime of violence while armed with a firearm should be maintained. Under the RCCA's proposed structure, a 5-year mandatory minimum sentence should attach to an enhancement that involves a dangerous weapon or imitation dangerous weapon, where: (1) the underlying offense is a crime of violence; and (2) the weapon involved was a firearm or imitation firearm. This would attach a mandatory minimum to offenses such as armed carjacking, armed sexual assault, armed robbery, and armed kidnapping, but would not extend a mandatory minimum to drug-related offenses. The presence of any firearm is inherently dangerous and can create a significant risk of violence—including a risk of violence to both intended and unintended victims—and the presence of that firearm during a crime of violence necessitates a proportionate sentence. A minimum sentence reflects the community and the legislature's sense that committing a crime of violence while armed is unacceptable by community standards, and will be penalized accordingly.

The lack of a minimum sentence for First Degree Murder would be unprecedented. Every other state imposes at least a minimum term of imprisonment. 32 states impose a minimum sentence of life, either with or without the possibility of parole. Of the remaining states, the vast majority impose a very substantial minimum sentence. Only a few states impose a smaller minimum sentence (Texas imposes a five-year minimum, Alabama, Arkansas, and Montana impose a ten-year minimum). But no state (including the many states that have adopted part or all of the Model Penal Code) imposes no minimum sentence for first degree murder. The District's existing 30-year minimum sentence for first degree murder is comparable to other states (including states that have adopted the Model Penal Code) and should be retained.

[11] The public opinion survey in Appendix I does not appear to contain facts pattern that would be relevant to Fourth and Fifth Degree Trafficking of a Controlled Substance.

The Commentary cites to recommendations from the Judicial Conference of the United States, the American Law Institute, and the American Bar Association, which all oppose mandatory minimum sentencing schemes. *See* Commentary on Subtitle I, at 384-85. However, the Judicial Conference of the United States *Letter to the U.S. Sentencing Commission dated July 31, 2017* makes no reference to homicide offenses. American Bar Association Resolution 10(b) also gives no indication that minimum sentences for homicide offense were considered. Perhaps most tellingly, the American Law Institute has previously reported sharp criticism of mandatory minimum sentences by a federal judge *because they required the judge to impose a sentence greater than the judge would give to a murderer*. *See* American Law Institute, Model Penal Code: Sentencing § 6.06, Proposed Final Draft (April 10, 2017), Comment m. As detailed therein:

> [R]ecently I had to sentence a first-time offender, Mr. Weldon Angelos, to more than 55 years in prison for carrying (but not using or displaying) a gun at several marijuana deals. The sentence that Angelos received far exceeded what he would have received for committing such heinous crimes as aircraft hijacking, second degree murder, espionage, kidnapping, aggravated assault, and rape. Indeed, the very same day I sentenced Weldon Angelos, I gave a second-degree murderer 22 years in prison—the maximum suggested by the [U.S.] Sentencing Guidelines. It is irrational that Mr. Angelos will be spending 30 years longer in prison for carrying a gun to several marijuana deals than will a defendant who murdered an elderly woman by hitting her over the head with a log.

Id. The other comments from the ALI suggest that perhaps the most salient criticism of mandatory minimum sentencing schemes is that they adversely impact proportionality: "Mandatory-minimum-penalty laws are at war with the Code's tenets of proportionality in punishment." *Id.* But this concern does not apply to first degree murder, which already is the most serious criminal offense contemplated by the criminal code. Mandatory minimum sentencing has remained a topic of debate in recent years, but the criticism has not focused on minimum sentencing schemes for adults convicted of first degree murder. A minimum sentence of 30 years for premeditated first degree murder appropriately signals society's abiding belief in the inherent value of human life and should be maintained.

Although social science has long shown that the risk an individual will commit a violent offense declines as the individual ages, "an emerging theme in the literature is that offenders that are convicted of homicide offenses, including 1st degree murder, are more likely than other offenders to subsequently perpetrate lethal violence relative to offenders that have never committed a homicide." Matt DeLisi, *et al*., *Who will kill again? The forensic value of 1st degree murder convictions*, Forensic Science International: Synergy 1 (2019) at 12.

Professor DeLisi, an influential criminologist, conducted a study of 682 male offenders in Florida and found that a prior first degree murder conviction "was significantly associated with current homicide offending." *Id*. at 13. This remained true when the data was adjusted to account for age and race. *Id*. "Forensically, prior 1st degree murder convictions appear to be a marker for

an offender who not only poses elevated risk of killing again, but also elevated risk of killing multiple victims." *Id*. at 15.

> Prior convictions for 1st degree murder and subsequent homicide offending are also likely manifest indicators of a latent homicidal propensity. To illustrate, a recent study of a population of federal correctional clients found that about 12% of the population experience some degree of homicidal ideation. Moreover, correctional clients with homicidal ideation were significantly more likely to perpetrate a host of crimes including completed and attempted homicides, kidnapping, armed robbery, and aggravated assault, and these offenders also evinced more severe and extensive psychopathology.

Id. at 15. Given these findings, the penalty for first degree murder under current law can help protect the community. Accordingly, USAO-DC recommends maintaining the 30-year minimum sentence for premeditated first degree murder.

Revised Criminal Code Act Substantive Criminal Law Provisions

Homicide

Accomplice Liability for Felony Murder

The RCCA proposes eliminating accomplice liability for felony murder. *See* RCCA § 22A-2101(g). The RCCA also proposes requiring that, for felony murder, the lethal act be committed "in the course of and in furtherance of committing or attempting to commit" the predicate offense, and proposes limiting the predicate offenses for felony murder from current law, including eliminating certain types of child physical abuse and other serious crimes as potential predicates for a felony murder conviction. *See* RCCA § 22A-2101(b)(3).

However, we recommend that, with respect to accomplice liability, the Council adopt a compromise position, and create an affirmative defense to felony murder. Under this affirmative defense, a defendant would not be liable for felony murder if the defendant could prove that they did not commit the lethal act, and either reasonably believed no participant in the predicate felony offense intended to cause death or serious bodily injury, or made reasonable efforts to prevent another participant from causing the death or serious bodily injury of another. Notably, creating such an affirmative defense is consistent with a previous recommendation of the CCRC. This compromise position recognizes that accomplice liability for felony murder is necessary in many situations because, even where it is possible to prove the identity of the perpetrators of the offense, it is often not possible to identify the specific offender who "commit[ed] the lethal act." Without some form of accomplice liability, crimes committed by *multiple* perpetrators would escape felony murder liability, while the same offense committed by a *single* perpetrator could result in felony murder liability. For example, a gang rape perpetrated by two or more individuals that resulted in the victim's death may result in no liability for murder, as it may not be possible to determine which defendant committed the lethal act. A father and mother both systematically abusing their child, resulting in the child's death, may result in no liability for murder. Where two individuals fire gunshots at a victim at the same time in the course of an

armed robbery or carjacking, and it is impossible to prove which bullet caused the victim's death, there may be no liability for murder. These examples show the necessity of accomplice liability for felony murder in situations where its absence would otherwise mean that neither person responsible for killing someone in the course of what is an inherently dangerous and violent offense is held accountable for murder. In murder cases, unlike for other offenses, the murdered victim cannot provide any information about what happened during the offense. By altering liability for accomplices under a felony murder theory, the RCCA proposal would effectively remove murder liability for certain felony murders committed by groups of perpetrators. Indeed, the more people who commit the predicate offense together, the less likely it would be that liability could attach for felony murder.

To provide additional context to this issue, below are several examples of accomplice liability in historic felony murder prosecutions in the District.

In *Benn v. United States*, 801 A.2d 132 (D.C. 2002), the evidence established that two individuals forcibly brought decedent Charles Williams to his fiancée's apartment.[12] "After searching for money, the two men forced the decedent out of the house and into a waiting car." *Id.* at 134. The next morning, his bullet-ridden body was found behind an elementary school. *Id.* The victim's body was found approximately seven to eight hours later. *Id.* There was duct tape around his wrists and mouth and $45 was sticking out of his pants pocket. *Id.* Four live rounds of ammunition were found near the body, and one spent shell casing. *Id.* The autopsy found two gunshot wounds, although it is unclear if those wounds could have been caused by the same projectile. *Id.* The jury convicted Benn of first degree felony murder while armed and related kidnapping, assault, and weapons charges. *Id.* at 133-34. There were no eyewitnesses to the commission of the lethal act. Instead, the evidence showed that the defendants were with the victim seven to eight hours later and that he was clearly being held hostage. There were no direct eyewitnesses to the murder itself and no physical evidence tying the defendants to the murder. Accordingly, if the law required proof of which specific individual actually fired the fatal shot, no one would be held accountable for murder for this crime.

Similar factual circumstances were presented by *Ashby v. United States*, 199 A.3d 634 (D.C. 2019). Victim Carnell Bolden was dropped off by his girlfriend, Danielle Daniels, at a house on W Street, N.W. at six in the evening. *Id.* at 640. When the decedent did not come back within ten minutes, she got out of the car and began walking up and down the street attempting to call him. *Id.* at 641. She returned to her car, and later saw a dark figure wearing a black hooded sweatshirt firing at the car. *Id.* Ms. Daniels survived the shooting, but was very seriously injured. *Id.* She spent three months in the hospital and suffered permanent nerve damage and the loss of use of her left hand. *Id.* The following morning, police found her boyfriend's body in a different quadrant of the city. *Id.* The body appeared to have been dragged to the location and had suffered two gunshots to the face that had been fired at close range. *Id.* Duct tape covered the victim's eyes and mouth and his feet were bound by duct and packing tape and an electrical cord from a television set. *Id.* Police then searched the house on W Street, and found a coat with the

[12] Benn's conviction was reversed because of the trial court's error in applying the rule on witnesses to the defendant's mother, who would have retaken the stand in support of her son's alibi defense. The defendant was later retried and convicted a second time. *See Benn v. United States*, 978 A.2d 1257 (D.C. 2009).

decedent's blood on it and a television set missing its electrical cord. *Id.* Police also found the decedent's blood in a vehicle that one of the defendants had access to. *Id.* As a result, police concluded that the victim had been killed in the home and then transported to where his body was found. *Id.* The jury was presented evidence that the defendants had a connection to the house on W Street, and that Defendant Keith Logan had spoken by phone with the decedent twice in the time leading up to his appearance with his girlfriend at the house. *Id.* Phone records also showed communication between two of the defendants on the day of the murder, and cell site data for one defendant (Paul Ashby) showing his phone had traveled in the direction of where the body was found on the night of the murder. *Id.* at 642. Defendant Keith Logan had previously suggested to another acquaintance that they rob and kill the decedent, but the acquaintance turned down the offer. Defendant Paul Ashby later admitted his role to an acquaintance. *Id.* The evidence did not establish which defendant committed the lethal act. The identity of the perpetrators was established circumstantially, but it was impossible to know which of the defendants committed the lethal act. The victim's bound body was found the next day with two gunshots wounds to the head. Here too, absent the felony murder rule, no one would be held accountable for murder in this violent crime.

Felony murders committed by two or more perpetrators involving other enumerated felonies could lead to the same result in a number of different scenarios:

- A gang rape perpetrated by two or more individuals that resulted in the victim's death may result in no liability for murder, as it may not be possible to determine which defendant committed the lethal act.
- A case where both a father and mother systematically abused their child, resulting in the child's death.
- Witnesses observe two robbers enter a liquor store, both armed with firearms. There is no surveillance video inside the store, and only a single clerk is working there. Witnesses hear the sound of a single shot and see both robbers leaving with cash. When police arrive, there are signs of a struggle within the store. A single cartridge casing is found inside the establishment, but is never linked to a firearm.

In each of these cases, it is impossible to prove the identity of the individual who committed the lethal act or a specific intent to kill by any of the perpetrators. Accordingly, these individuals would not be liable for murder.

We acknowledge that the felony murder rule has often been criticized for being applied in an unjust fashion that unfairly and disproportionately punishes criminal conduct. On the other hand, the absence of accomplice liability for felony murder may lead to the crimes referenced above going unpunished as murder. To balance these views, we propose the compromise affirmative defense set forth above, which was previously proposed by the CCRC. This affirmative defense balances the risk of disproportionately and unfairly holding defendants accountable for the unanticipated and accidental conduct of an accomplice, while still holding to account defendants who could otherwise escape liability for murder in the circumstances set out above.

Child Physical Abuse as a Predicate Offense to Felony Murder

The RCCA proposes, as one of the predicate offenses to felony murder, including "First degree criminal abuse of a minor under § 22A-2501 when the actor knowingly causes serious bodily injury." RCCA § 22A-2101(b)(3)(H). USAO-DC recommends that, in addition to this predicate offense, the RCCA include as a predicate offense to felony murder "Second degree criminal abuse of a minor under § 22A-2501 when the actor knowingly causes significant bodily injury."

The CCRC originally recommended including both First Degree and Second Degree Criminal Abuse of a Minor as predicates to felony murder, then later proposed eliminating them as predicates. In response to USAO-DC concerns over the elimination of these offenses, the CCRC added back the predicate offense of "First degree criminal abuse of a minor under § 22A-2501 when the actor knowingly causes serious bodily injury." Although this addition was an improvement from an earlier draft, the addition of Second degree criminal abuse of a minor is also critical.

"Serious bodily injury" under the RCCA is a high threshold, and requiring a predicate offense that requires knowingly causing "significant bodily injury" is a more appropriate threshold. "Significant bodily injury" under the RCCA may result, for example, where a defendant burns a child, causes an injury to the child that requires stitches or other immediate medical treatment, fractures the child's bone, or strangles the child. Where the knowing imposition of "significant bodily injury" leads to the child's death, the law should provide liability for felony murder.

Felony murder can be an important way to ensure liability for defendants who engage in horrendous patterns of physical abuse of children, but where no single act of abuse can be pointed to as the cause of death. "A conviction for intentional homicide [in the child abuse context] is difficult to obtain." Barry Bendetowies, *Felony Murder and Child Abuse: A Proposal for the New York Legislature*, 18 Fordham Urb. L.J. 383, 384 (1991). "First, the government must prove intent to cause death, a factor often absent in child abuse cases." *Id.* "Second, frequently the sole witness is the abuser, since such crimes usually occur in private." *Id*. "Moreover, it is difficult to convince a jury that a parent intentionally killed his child." *Id.* at 384–85. Rather, "in a case of child abuse of long duration the jury could well infer that the perpetrator comes not to expect death of the child from his action, but rather that the child will live so that the abuse may be administered again and again." *Midgett v. State*, 729 S.W.2d 410, 413 (Ark. 1987).[13] Courts have "held that child abuse may have several independent purposes: to punish, to chastise, to force the child's conformity with the father's idea of propriety, and to impress upon the child the virtues of obedience and discipline." Bendetowies, 18 Fordham Urb. L.J. at 401 (citing *People v. Jackson*, 172 Cal. App. 3d 1005, 218 Cal. Rptr. 637, 641 (1st Dist. 1985)).

[13] Following this decision, the Arkansas legislature amended the statute to define knowingly taking the life of a child under the age of 14 as first degree murder. A.C.A. § 5–10–102(a)(3).

In a pattern of abuse case, the abuser often does not intend to kill the child. The abuser acts repeatedly over a course of time with disregard for the fact that their conduct may kill a child. For example, some children can survive being shaken once or twice, but they may have internal injuries that are not diagnosed. Subsequently, when the child is shaken, the child may die. As a further example, if a child is beaten and has broken ribs or a lacerated liver, the child may not immediately die, but following a subsequent beating, the same conduct may cause the child's death. In certain situations, the abuser's conduct may constitute circumstances manifesting extreme indifference to human life, which would constitute Second Degree Murder under the RCCA. But there may also be situations where the government is unable to prove that a defendant's reckless conduct manifested extreme indifferent to human life, but where murder liability should still attach. In those situations, where the government could prove that the defendant negligently caused the death of the child in the course of committing the offense of criminal abuse of a minor, a defendant should be liable for felony murder, with either First or Second Degree Criminal Abuse of a Minor as the predicate offense.

Mitigation of Murder by Mere Words

USAO-DC recommends that the RCCA preserve the long-standing rule that "mere words" are inadequate provocation to mitigate Murder to Manslaughter. The RCCA recognizes mitigating circumstances to Murder, which include "[a]cting under the influence of an extreme emotional disturbance for which there is a reasonable cause as determined from the viewpoint of a reasonable person in the actor's situation under the circumstances as the actor believed them to be." RCCA § 22A-2101(f)(1)(A). The effect of this mitigation defense is: "If the government fails to prove the absence of mitigating circumstances beyond a reasonable doubt, but proves all other elements of murder, the actor is not guilty of murder, but is guilty of voluntary manslaughter." RCCA § 22A-2101(f)(2). The Commentary to this provision notes that the D.C. Court of Appeals "has held that a person commits voluntary manslaughter when he or she causes the death of another with a mental state that would constitute murder, except for the presence of mitigating circumstances. The DCCA has not clearly defined what constitutes a 'mitigating circumstances,' but has held that mitigating circumstances include an accused 'act[ing] in the heat of passion caused by adequate provocation.' Under common law, cases interpreting what constituted adequate provocation came to recognize 'fixed categories of conduct' that the law recognized as sufficiently provocative to mitigate murder to the lesser offense of manslaughter." Commentary on Subtitle II, at 24.

The Commentary further notes, however, that the RCCA adopts a "modern approach" to provocation; "[i]nstead of being limited to the 'fixed categories' that have been previously recognized by courts, the modern approach more generally inquires whether the more generally inquires whether the 'provocation is that which would cause . . . a reasonable man . . . to become so aroused as to kill another' such that 'the actor's loss of self-control can be understood in terms that arouse sympathy in the ordinary citizen," allowing the possibility of the mitigation of "homicides from murder to manslaughter even under circumstances that have not been traditionally recognized at common law." *Id.* The Commentary states in a footnote: "For example at common law, and under current DCC case law, mere words alone are inadequate provocation. However, under the 'extreme emotional disturbance formulation, it is at least

possible that mere words, if sufficiently provocative, could constitute a reasonable cause for an extreme emotional disturbance." *Id.* at 24 n.149 (internal citations omitted).

This proposed change abandons the long-standing rule that "mere words" are inadequate provocation to mitigate murder to manslaughter. More than a century ago, it was already considered "well settled" that "mere words, however aggravating, are not sufficient to reduce the crime from murder to manslaughter." *Allen v. United States*, 164 U.S. 492, 497 (1896). Traditional formulations hold that "[m]ere words standing alone, no matter how insulting, offensive, or abusive, are not adequate provocation." *Nicholson v. United States*, 368 A.2d 561, 565 (D.C. 1977). This principle has been repeated and reaffirmed in modern times. *See West v. United States*, 499 A.2d 860, 865 (D.C. 1985); *Bostick v. United States*, 605 A.2d 916, 919 (D.C. 1992); *High v. United States*, 972 A.2d 829, 836 n.5 (D.C. 2009).

The reason for the rule's persistence is quite intuitive; to mitigate a murder charge to manslaughter, with the accompanying reduction in sentence and lessened societal condemnation, is a major step which courts have been reluctant to take absent extremely provoking circumstances. Provocation is adequate only in "the most exceptional cases" wherein the deceased "provoked a defendant by committing an offense that was so grave, and so heinous" that the resultant killing would be, though not justified, expected. *High*, 972 A.2d at 834. Mitigation can be defended only when the provocation is "so extreme that a reasonable person could conclude that '[the deceased] had it coming.'" *Id.* (quoting Susan D. Rozelle, *Controlling Passion: Adultery and the Provocation Defense*, 37 Rutgers L.J. 197, 209 (2005)).

Mere words cannot satisfy this requirement. "[W]ords do not constitute adequate provocation because they amount to 'a trivial or slight provocation, entirely disproportionate to the violence of the retaliation.'" *Id.* at 836 n.5 (quoting *Nicholson*, 368 A.2d at 565). Simply put, courts have not embraced the prospect that words alone, however hostile or vile, could confer any legitimacy upon a killing. *Cf. West*, 499 A.2d at 864-65 (holding that an exchange of hostile words was not adequate provocation).

The insufficiency of words as even a partial excuse for a killing is complemented by the law's expectation that reasonable people will be able to control their reactions to insults or slights. A reasonable person is expected to "control the feelings aroused by an insult or an argument." *Commonwealth v. Bermudez*, 348 N.E.2d 802, 804 (Mass. 1976). Indeed, courts need to "encourage people to control their passions" rather than "countenance the loss of self-control," as doing otherwise may enable bad behavior. *People v. Pouncey*, 471 N.W.2d 346, 389 (Mich. 1991).

There is also a consistency in the law's refusal to accept mere words as mitigation across different types of crimes. Mere words, in the absence of some other hostile act, "cannot act as a defense to the criminal charge of assault." *Boyd v. United States*, 732 A.2d 854, 855 (D.C. 1999). Since "mere words alone do not excuse even a simple assault," it would seem illogical to allow mere words to mitigate the far greater crime of murder. *Allen*, 164 U.S. at 497. In sum, courts have recognized that mere words constitute provocation for neither manslaughter nor other types

of aggression; to change this would render the law either inconsistent or deeply problematic. *See United States v. Alexander*, 471 F.2d 923, 936 n.26 (D.C. Cir. 1972).

Enhancement for Committing Murder and Manslaughter While Armed with a Dangerous Weapon

The RCCA proposes removing the enhancement to Murder and Manslaughter under current law that applies where a defendant commits the offense of Murder or Manslaughter while armed with a dangerous weapon. *See* D.C. Code § 22-4502 (general enhancement for committing a crime of violence or dangerous crime while armed). USAO-DC opposes the removal of this enhancement, and recommends that the RCCA offenses of Murder and Manslaughter both contain an enhancement where the actor commits the offense "by displaying or using what, in fact, is a dangerous weapon or imitation dangerous weapon."

In support of this proposed change, the Commentary provides: "As a practical matter, nearly all murders involve a dangerous weapon, and raising the gradation of murder in all instances using a dangerous weapon would increase liability significantly compared to the current murder statute. Moreover, as a practical matter, it is unclear whether the current code's separate weapon enhancement significantly affects sentences for murder. This change improves the proportionality of the revised code, as murder while armed does not inflict greater harm than unarmed murder, and therefore does not warrant heightened penalty." Commentary on Subtitle II, at 21. However, although a murder committed without the use of a dangerous weapon or with the use of a dangerous weapon both result in the loss of a human life, the fact of a dangerous weapon should subject a defendant to a higher penalty. A defendant creates an increased risk of danger by introducing a weapon to an offense, which could result in additional harm to other potential victims than if the defendant committed the offense unarmed.

Moreover, the RCCA proposes removing liability for "assault with intent to commit" offenses. Under current law, where a defendant assaults another person with intent to kill that person, they are typically charged with Assault with Intent to Kill. *See* D.C. Code § 22-401. When armed, a defendant is typically charged with Assault with Intent to Kill While Armed. *See* D.C. Code §§ 22-401, -4502. The Commentary explains that, in the RCCA, "liability for the conduct criminalized by the current [assault with intent] offenses is provided through application of the general attempt statute in [RCCA § 22A-301] to the completed offenses." Commentary on Subtitle II, at 80. This means that a person who would have been charged under current law with Assault with Intent to Kill will frequently be charged with Attempted Murder under the RCCA, and that a person who would have been charged under current law with Assault with Intent to Kill While Armed will frequently be charged with Attempted Murder While Armed under the RCCA. Notably, the D.C. Sentencing Commission Guidelines rank Assault with Intent as a Group 5 offense, but rank Assault with Intent to Kill While Armed higher, as a Group 3 offense. In situations that involve both the attempted or completed murder of a victim, the existence of a dangerous weapon or imitation dangerous weapon increases the severity of the offense, and the RCCA should recognize this increased severity through the creation of this enhancement to both Murder and Manslaughter.

Protected Person Enhancement for Negligent Homicide

USAO-DC recommends creating an enhancement to the offense of Negligent Homicide under RCCA § 22A-2103 where the actor is "reckless as to the fact that the decedent is a protected person." The existence of this enhancement would be proportionate to the harm caused by an actor negligently causing the death of, for example, a young child or other protected person. We recognize that, at first blush, it may appear counterintuitive to have an offense that requires a mental state of *negligence* and an enhancement that requires a mental state of *recklessness*. However, there are clear situations where the actor is reckless to the fact that the victim is a child—and will often even *know* that the victim is a child—and negligently causes the death of the child even in spite of that. Indeed, the fact that the victim is a protected person—such as a child—may mean that an actor should be *more* careful with the child to ensure that they do not negligently cause the death of the child. This may be the case in child physical abuse cases, where the actor knows that the victim is a child, and nonetheless engages in actions that negligently cause the death of the child.

Sexual Offenses

Defense to Child Sexual Abuse

The RCCA proposes departing from long-standing District law that mistake of age is not a legal defense to child sexual abuse,[14] and creating an affirmative defense to felony child sexual abuse where: (1) the victim is 14 or 15 years old (or 16 or 17, in the case of sexual abuse by a person in a position of trust or authority); (2) the defendant reasonably believes the victim is 16 or older (or 18 or older, in the case of sexual abuse by a person in a position of trust or authority); and (3) the reasonable belief is based on an oral or written statement that the victim made to the defendant about the victim's age. *See* RCCA § 22A-2302(g)(2)-(3). For less severe forms of child sexual abuse, the government would be required to prove, as an element, that the defendant was reckless as to the victim's age. *See* RCCA § 22A-2304(a)(1)(A) (Sexually suggestive conduct with a minor); RCCA § 22A-2305(a)(2)(A) (Enticing a minor into sexual conduct); RCCA § 22A-2306(a)(2) (Arranging for sexual conduct with a minor or person incapable of consenting).

However, because this defense would allow for the introduction of evidence regarding the defendant's objectively "reasonable belief" as to the age of the victim, the existence of this defense could, practically, create a legally sanctioned justification for the defense to introduce evidence that would otherwise have no probative value at trial. For example, to show an objectively "reasonable belief," the defendant may seek to elicit testimony relating to the child victim's appearance, including the child victim's physical development, maturity, and clothing, or photos of how the child victim presents themselves on social media. This testimony would be elicited to show why the victim appeared to be older than the victim's true age. Allowing evidence of the defendant's "reasonable belief" would allow this type of demeaning and humiliating evidence to be deemed probative and, thus, admissible at trial. If this proposal goes

[14] *See* D.C. Code § 22-3011(a).

into effect, a defendant may also seek to introduce evidence currently precluded by the Rape Shield Law[15] regarding the victim's prior sexual behavior to validate their "reasonable belief" that the child victim was of consenting age. Such evidence could include, for example, the victim's known history of engaging in sexual acts with adults, prior pregnancies or births, involvement in prostitution and/or other sexually related behavior of an adult nature that suggested to the defendant that the victim was of a legally mature age. This evidence is the exact type that exposes the extremely intimate life of the victim (and here, a child victim) that the Rape Shield Law was specifically designed to exclude except in the most unusual cases where the probative value of the evidence is precisely demonstrated. We account for compelling fact patterns in exercising our charging discretion, where—despite the strict liability for this offense—a person may have reasonably believed that the victim was not underage. Allowing for this legal defense, however, may permit the defendant to elicit evidence at trial in a manner that is inappropriate, unnecessarily humiliating for the sexual assault victim, and directly contrary to the compelling policy reasons behind the Rape Shield Law.[16]

While we oppose the creation of a reasonable mistake of age defense for child sexual abuse, we also oppose a dichotomy between a reasonable mistake of age affirmative defense for Sexual Abuse of a Minor under RCCA § 22A-2302, and an element requiring proof of the defendant's recklessness as to the victim's age under RCCA § 22A-2304(a)(1)(A) (Sexually suggestive conduct with a minor), RCCA § 22A-2305(a)(2)(A) (Enticing a minor into sexual conduct), and RCCA § 22A-2306(a)(2) (Arranging for sexual conduct with a minor or person incapable of consenting)). Although we strongly believe that the RCCA should remove both a reasonable mistake of age defense and requirement of recklessness as to the child's age for all child sexual abuse provisions, at a bare minimum, the provisions should align to create the same reasonable mistake of age affirmative defense for all provisions. Notably, in response to USAO-DC concerns, the reasonable mistake of age defense in RCCA § 22A-2302(g) has been narrowed in the RCCA, including its applicability only to victims who are 14 and 15 years old (or 16 or 17, where the defendant is in a position of trust with or authority over the victim). By contrast, in the other child sexual abuse provisions, it is not only the government's burden to prove that the defendant was reckless as the victim's age, but there are no limitations on what that recklessness must be based on, and no minimum age of a victim to which it would apply. Although Sexual Abuse of a Minor under § 22A-2302 is a more serious offense that carries more serious penalties than the other offenses listed above, the same reasoning should apply to all sexual offenses involving minors. Even when less serious conduct is involved, the government has the same concerns that the change from the existing law would sanction irrelevant and highly prejudicial material being introduced at trial. The evidence, including evidence regarding the young victim's physique, clothing, affect, behavior, language choices, would be argued to be "relevant" in the same way for all of the child sexual abuse provisions. Victims should be treated the same and have the same protections, regardless of the perceived gravity of the offense.

[15] *See* D.C. Code §§ 22-3021, 3022.

[16] *See Scott v. United States*, 953 A.2d 1082, 1089 (D.C. 2008) (the purpose of the Rape Shield Law is to "safeguard against unwarned invasions of privacy" and "to exclude legally irrelevant evidence that may distract the jury or lead it to discount the complainant's injury because of societal stereotypes and prejudices").

Requirement that Certain Sexual Conduct Have a "Sexual" Intent

The RCCA proposes adding the modifier "sexually" to certain conduct before it can constitute a "sexual act" or "sexual contact," such that certain behavior would only constitute a sexual offense if the defendant has a "sexual" intent. *See* RCCA §§ 22A-101(118)(c), 22A-101(119)(B)(ii).[17]

However, adding the modifier "sexually" would constitute an ill-advised change from current law, as it would unduly limit situations where the defendant's conduct should qualify as a sexual act or sexual contact. Sexual violence can be about power and control, *not* sex or sexual gratification. When committing a sexual offense, a defendant may be motivated by a desire to be violent or to assert power over a victim, not necessarily to be sexually aroused. For example, if, at a fraternity or sorority hazing, a defendant publicly penetrated another person with an object, the defendant may not have been acting with a sexual desire, but may have been acting with an intent to abuse, humiliate, harass, or degrade the victim. This would and should constitute a sexual offense. Further, even where a victim clearly experiences a sexual violation, it is often difficult, if not impossible, to prove that a defendant committed the offense for a sexual reason. For example, if a defendant grabs the vagina, breast, or buttocks of a stranger, that victim likely will feel sexually violated, and the conduct should constitute a sexual offense. Absent evidence of the defendant having an erection or outwardly manifesting sexual pleasure through words or actions—which is rare in many cases, particularly those involving sudden, brief, sexual assaults of strangers—the government may not be able to prove that the defendant's actions were sexually arousing or gratifying. The government, however, would be able to show that, at a minimum, the defendant intended to humiliate, degrade, or harass the victim.

Sexual Offense Repeat Offender Enhancement

USAO-DC recommends adding a Sexual Offense Repeat Offender Penalty Enhancement to RCCA § 22A-606 to provide:

> "(c) *Sexual offense repeat offender penalty enhancement.* A sexual offense repeat offender penalty enhancement applies to an offense under Chapter 2, Subchapter III of this title when, in fact:
>
> (1) The actor commits a sexual offense under Chapter 2, Subchapter III of this title; and
>
> (2) The actor, in fact, is or has been found guilty of committing a sexual offense under Chapter 2, Subchapter III, or a comparable offense, involving 2 or more victims."

[17] Under the RCCA proposal, a "sexual act" would include: "Penetration, however slight, of the anus or vulva of any person by any body part or by any object, with the desire to *sexually* abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire" (emphasis added). RCCA §§ 22A-101(118)(c). A "sexual contact" would include: "Touching of the clothed or unclothed genitalia, anus, groin, breast, inner thigh, or buttocks of any person: (i) With any clothed or unclothed body part or any object, either directly or through the clothing; and (ii) With the desire to *sexually* abuse, humiliate, harass, degrade, arouse, or gratify any person, or at the direction of someone with such a desire" (emphasis added). RCCA § 22A-101(119)(B)(ii).

USAO-DC is concerned that there is no repeat offender penalty enhancement specific to sexual offenses given the gravity of sexual offenses, regardless of whether they are felonies or misdemeanors. Under current law, the sexual offense repeat offender enhancement applies when "[t]he defendant is or has been found guilty of committing sex offenses against 2 or more victims, whether in the same or other proceedings by a court of the District of Columbia, any state, or the United States or its territories." D.C. Code § 22-3020(a)(5). Under RCCA § 22A-606, for a misdemeanor repeat offender penalty enhancement to attach, there must be *two* or more prior convictions; by contrast, the sexual offense enhancement under current law applies with only *one* prior conviction, as the two sexual offenses can include the offense of conviction. Further, the general repeat offender enhancement provision in RCCA § 22A-606 only applies to prior *convictions*, and does not account for multiple victims within the same case. Adding USAO-DC's proposed provision to RCCA § 22A-606 is consistent with current law, which permits the enhancement with only one previous conviction, or if there are two or more victims in the instant case. The wording "is . . . guilty of committing sex offenses against 2 or more victims" means that one victim could be a victim in the instant case, and one a victim in a previous case. A multiple victim enhancement recognizes that a defendant who commits sexual offenses against multiple victims should be treated more severely than a defendant who commits sexual offenses against a single victim. A defendant who is engaging, or has engaged in, sexual offenses against multiple victims is engaging in more predatory behavior that is more dangerous and that should be penalized accordingly.

Penalty Enhancements for Young Age of the Victim and An Actor in a Position of Trust

USAO-DC recommends that the sexual offense penalty enhancements currently located in D.C. Code § 22-3020 be applied to all sexual offenses. Although most of these enhancements apply under the RCCA to the offenses of Sexual Assault and Sexual Abuse of a Minor, USAO-DC recommends that they also apply to the offenses of Sexual Abuse by Exploitation, Sexually Suggestive Conduct with a Minor, Enticing a Minor into Sexual Conduct, and Arranging for Sexual Conduct with a Minor or Person Incapable of Consenting.

Specifically, an enhancement should apply to these offense and to Incest where the victim is under 12 years old. The victim's young age is an element of Sexual Abuse of a Minor under RCCA § 22A-2302, and is an enhancement to Sexual Assault under RCCA § 22A-2301. The victim's young age (under age 12) should be an enhancement to the other sexual offense provisions as well. Although the offenses may involve less physically invasive sexual acts than the sexual acts required by RCCA § 22A-2301 or § 2302, given the inherent vulnerability of very young children, it should be, for example, more severely punishable to engage in sexually suggestive conduct with a 9-year-old child than to engage in identical conduct with a 15-year-old child under RCCA § 22A-2307. This logic applies similarly to other sexual offenses that necessarily involve minors—such as enticing and arranging—or that could involve minors—such as nonconsensual sexual conduct.

Likewise, an enhancement should apply to these offense where the defendant is in position of trust with or authority over the victim. This enhancement should apply to all offenses that could involve minor victims, as it is more serious and egregious to engage in sexual conduct

when this relationship exists. For example, a defendant who is a child's biological parent who engages in sexually suggestive conduct under RCCA § 22A-2307 should be subject to a higher penalty than a defendant who engages in sexually suggest conduct with a person where there is no significant relationship.

Finally, if a defendant acts with one or more accomplices for any sexual offense, this behavior should be subject to an enhancement. This applies to all sexual offenses involving minors, regardless of the perceived gravity of the offense, as well as to all sexual offenses involving adult victims. For example, under RCCA § 22A-2303, if a group of doctors commit a sexual offense against a patient, or if a group of prison guards commit a sexual offense against an inmate, they should be more severely punished than a single defendant who commits that offense alone because the potential emotional and physical harm based on the aggregate criminal behavior of the defendants is potentially much greater on the victim than if the victim was assaulted by only one defendant. Therefore, an accomplice enhancement should apply to this and other sections.

Nonconsensual Sexual Conduct

The RCCA proposes that, to be liable for this offense, an actor must be "*[r]eckless* as to the fact that the actor lacks the complainant's effective consent." RCCA § 22A-2307(a)(2), (b)(2) (emphasis added). USAO-DC recommends, for both gradations of this offense, a requirement only that the actor be "negligent" as to the fact that they lack the victim's effective consent, rather than "reckless." Negligence is the appropriate mental state. The current misdemeanor sexual abuse statute essentially assigns a negligence standard to the defendant's mental state as to the victim's lack of consent, providing that the defendant must "have knowledge or reason to know that the act was committed without that other person's permission." D.C. Code § 22-3006. This negligence standard is consistent with the plain language of the current misdemeanor sexual abuse statute, the jury instructions on misdemeanor sexual abuse, *see* D.C. Crim. Jur. Instr. 4.400(V)(2) (defendant "knew or should have know that s/he did not have [complainant's] permission"), and with case law defining misdemeanor sexual abuse, *see Mungo v. United States*, 772 A.2d 240, 244-45 (D.C. 2001).

Definition of "Position of Trust with or Authority Over"

The RCCA definition of "position of trust with or authority over" under RCCA § 22A-101(94) replaces the definition of "significant relationship" in D.C. Code § 22-3001(10). USAO-DC recommends, in subsection (G) of the RCCA definition of "position of trust with or authority over," using the words "in a position of trust with or authority over" instead of the words "exercises supervisory or disciplinary authority over the complainant." In support of this change, the Commentary states: "Requiring the actor to exercise supervisory or disciplinary authority over the complainant ensures that the relationship between the actor and the complainant rises to the level of coerciveness necessary to make otherwise consensual sexual activity criminal." Commentary on Subtitle I, at 567. This limitation, however, may unduly limit the categories of people who should fall under this definition. For example, it is unclear if a music instructor (outside of a school context), or a day camp counselor would fall under this definition. While

those actors would certainly be in a position of trust with the victim, it is unclear if they would exercise "supervisory or disciplinary authority" over the victim. The title of this definition, "position of trust with or authority over," is an apt descriptor of the relationships that should be included here. A position of trust is the heart of what this definition encompasses, and it should not be further limited by requirements that may be applied in a way that would limit individuals that would be generally considered to be in a position of trust with respect to the victim.

Incest

USAO-DC recommends removing the requirement for liability for incest that the actor "obtains the consent of the other person by undue influence" under RCCA §§ 22A-2308(a)(3) and (b)(3). "Undue influence" is defined in RCCA § 22A-101(129) as "mental, emotional, or physical coercion that overcomes the free will or judgment of a person and causes the person to act in a manner that is inconsistent with his or her financial, emotional, mental, or physical well-being." It is inappropriate, however, to require that consent be obtained "by undue influence" in the incest context. An example of incest is a father having sex with his minor biological daughter. Because of the power dynamic inherent in the parent/child relationship, the victim may, legally, act of her own "free will," in that no actual force is used and no express threats are made. It is unclear at what point the victim would no longer be deemed to be acting on their own free will. Incestual sexual abuse is often the result of insidious, and lengthy, grooming behavior by the defendant, but it is unclear whether grooming behavior (for example, buying candy for a child, giving gifts to a child, normalizing certain sexual behavior, escalating in sexual behavior) would qualify as "mental, emotional, or physical coercion." Moreover, it is unclear who would decide if the sexual abuse is "inconsistent with his or her financial, emotional, mental, or physical well-being." By criminalizing child sexual abuse, society has essentially made a value judgment that certain sexual conduct is inconsistent with a child's financial, emotional, or physical well-being. But because of the psychological impact such grooming behavior has, a victim often will not internalize such abuse as being detrimental to their well-being. Nor would a parent or guardian necessarily always characterize the abuse as detrimental, particularly where the parent or guardian is the perpetrator. The CCRC notes that this type of behavior may be criminalized elsewhere, including in the offense of Sexual Abuse of a Minor. However, just because particularly heinous behavior could be criminalized by another statute does not mean that a separate statute should remove liability where there is a separate harm. In sum, USAO-DC recommends removing this provision from the Incest offense, as it is not appropriate for this offense.

Stalking

USAO-DC recommends that the RCCA modify the definition of "significant emotional distress" in RCCA § 22A-101(121). The current stalking statute provides liability where, among other ways, the defendant intended to cause to the victim to suffer "emotional distress," knew his/her actions would cause the victim reasonably to suffer "emotional distress," or should have known his/her actions would cause a reasonable person in the victim's circumstances to suffer "emotional distress." *See* D.C. Code § 22-3133. "Emotional distress" is defined under current

law as "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." D.C. Code § 22-3132(4).

Among other mechanisms of liability, the RCCA stalking statute provides liability where the defendant acted either with the intent to cause the victim to suffer "significant emotional distress" or negligently caused the victim to suffer "significant emotional distress." See RCCA § 22A-2801(a)(3)(A)(ii) and (B)(ii). The RCCA defines "significant emotional distress" to mean "substantial, ongoing mental suffering that may require medical or other professional treatment or counseling, and must rise significantly above the level of uneasiness, nervousness, unhappiness, or similar feeling, that is commonly experienced in day-to-day living." RCCA § 22A-101(121) (emphasis added). The Commentary provides: "The government is not required to prove that the person actually sought or needed professional treatment or counseling." Commentary on Subtitle I, at 627.

The Commentary to the definition of "significant emotional distress" provides: "The RCCA definition of 'significant emotional distress' clarifies, but does not substantively change, District law." Commentary on Subtitle I, at 650. To ensure that there is no change from current law, USAO-DC recommends tracking the current definition of "emotional distress" more closely, and clarifying that the victim's suffering "may, <u>but does not necessarily,</u> require medical or other professional treatment or counseling . . ."

The language in this provision should ensure accountability for the most serious stalkers, particularly those stalking intimate partners. Many, if not most stalking victims, including victims in a domestic violence relationship with the stalker, have understandably developed such strong coping skills to deal with the frightening stalking behavior that they would not consider, let alone seek out, "medical or other professional treatment" for the emotional pain they suffer. Based on their prior unsatisfactory experience with law enforcement, and/or other professions who are set up to provide safety and emotional relief, such victims may be skeptical that such individuals can assist them in any meaningful way. In addition, individuals who are victims of stalking behavior may be from communities who do not rely on medical or other professional treatment or counseling for a variety of reasons, or do not have the funds to utilize the services of these professionals. Due to the deep emotional toll it has on the victim, including paralysis, skepticism, and depression, it could be that the more intrusive the stalking behavior, the less likely the victim will seek medical or other professional treatment or counseling. The USAO-DC's proposed language clarifies that a victim need not actually seek out medical or other professional treatment or counseling for liability to attach.

Further, USAO-DC recommends subsuming the offense of electronic stalking into the broader offense of stalking. Under the proposed structure, there would not be liability for stalking if the actor engages in one activity proscribed by § 22A-2801 and one activity proscribed by § 22A-2802; this ignores that stalking behavior may encompass both types of behavior. It should be sufficient for stalking liability that the person engaged in a course of conduct that consists of 2 or more occasions of *either* activities proscribed by § 22A-2801(a)(1) *or* activities proscribed by § 22A-2802(a)(1). For example, if an actor were (with the requisite mens rea) to engage in one occasion of physically following or monitoring the victim (as

prohibited by § 22A-2801(a)(1)(A)) and one occasion of creating an image of the victim (as prohibited by § 22A-2801(a)(1)(A)), that should be sufficient for stalking liability. To address this, USAO-DC recommends subsuming the offense of electronic stalking into the offense of stalking, and allowing for stalking liability either for engaging in the activities listed in § 22A-2801(a)(1) *or* the activities listed in § 22A-2802(a)(1).

Voyeurism

USAO-DC recommends that liability attach for a defendant observing or creating an image of another person engaging in or submitting to a "sexual contact," in addition to the other bases for liability under this statute. Accordingly, USAO-DC recommends modifying RCCA § 22A-2801(a)(1)(B) and (b)(1)(B) to provide: " . . . the complainant engaging in or submitting to a sexual act, sexual contact, or masturbation." Under current law, a person is liable for voyeurism if they observe or record another person "engaged in sexual activity." D.C. Code § 22-3531(b)(3), (c)(1)(C). The Commentary notes that District case law has not addressed the meaning of "sexual activity," which may include "conduct short of penetration, such as kissing or caressing." Commentary on Subtitle II, at 497. The RCCA therefore only includes "sexual act or masturbation" as a basis for liability in subsections (a)(1)(B) and (b)(1)(B). USAO-DC believes, however, that liability should also attach where the defendant observes or creates an image of the victim engaging in or submitting to a sexual contact. Undoubtedly, a sexual contact can be a private and intimate experience, even where the parties remain clothed. For example, if a person is touching another person's genitalia underneath the clothing, even though they may be clothed, that is a private experience in which they have an expectation of privacy. It would create a strange dichotomy if voyeurism liability attached for a defendant creating an image of another person touching their own genitalia (masturbation), but no voyeurism liability attached for a defendant creating an image of someone else touching that person's genitalia (sexual contact). A defendant should be liable for voyeurism for observing or creating an image of that intimacy.

USAO-DC also recommends updating the Commentary for this offense to reflect the recent D.C. Court of Appeals decision in *Robinson v. United States*, No. 18-CM-1220 (November 10, 2021), which clarified the reasonable expectation of privacy in the context of voyeurism as related to "upskirting."

Unauthorized Disclosure of a Sexual Recording

USAO-DC recommends that liability attach for a defendant who distributes or displays an image or recording of the victim engaging in a "sexual contact," in addition to the other bases for liability under this statute. Accordingly, USAO-DC recommends modifying RCCA § 22A-2801(a)(1)(B) and (b)(1)(B) to provide: "(B) An image or an audio recording of the complainant engaging in or submitting to a sexual act, a sexual contact, masturbation, or sadomasochistic abuse." As discussed above with respect to the Voyeurism statute, a sexual contact can be an intimate, private experience that a victim has an interest in keeping private. This could be true even if nude genitalia are not visible. USAO-DC recommends that, to protect this privacy interest, "sexual contact" be added to this subsection.

USAO-DC also recommends that the "sexually" modifier be removed from RCCA § 22A-2801(a)(3)(A)(i). Accordingly, USAO-DC recommends modifying RCCA § 22A-2801(a)(3)(A)(i) to provide: "Alarm or ~~sexually~~ abuse, humiliate, harass, or degrade the complainant." At the time that the defendant is distributing these photos, the defendant's intent is rarely sexual. Rather, their intent is frequently to harass or humiliate the victim, or to express anger or seek revenge. They often do not obtain sexual gratification from disclosure of the image. Although the underlying material is sexual, there should be no requirement that the defendant have a sexual intent when the defendant discloses the material.

Human Trafficking

Reasonable Opportunity to Observe the Victim

USAO-DC recommends that the trafficking provisions related to minors include an exception to the general recklessness requirement as to the victim's age when the actor "had a reasonable opportunity to observe" the victim. This language would provide, for example, that a defendant is liable for an offense that involves a minor victim when the defendant is "reckless as to fact that the complainant is under 18 years of age, except, in a prosecution under this section in which the actor had a reasonable opportunity to observe the complainant, the government need only prove that the complainant is, in fact, under 18 years of age." This is consistent with both federal law, *see* 18 U.S.C. § 1591(c), and the current D.C. Code, *see* D.C. Code § 22-1834(b).

When Congress added this language to federal human trafficking law, the House Judiciary Committee Report stated: "This section of the bill also clarifies that 18 U.S.C. § 1591(c) provides that the government need not prove beyond a reasonable doubt that a defendant knew or recklessly disregarded the fact that the victim was under the age of 18 if the defendant had a 'reasonable opportunity to observe the person.' This is a clarifying amendment meant to codify *United States v. Robinson*, 702 F.3d 22, 34 (2d Cir. 2012) in which the Second Circuit held that in a 'prosecution under § 1591, the government may satisfy its burden of proof with respect to the defendant's awareness of the victim's age by proving any of the following beyond a reasonable doubt: (1) the defendant knew that the victim was under eighteen, (2) the defendant recklessly disregarded the fact that the victim was under eighteen, *or* (3) the defendant had a reasonable opportunity to observe the victim."[18] Inclusion of the "reasonable opportunity to observe" language is a crucial way to protect the minor human trafficking victim. Absent this language, many of the concerns raised above with respect to the affirmative defense to child sexual abuse would be present in the human trafficking context as well.

Penalty Enhancements

USAO-DC recommends adding the following penalty enhancements to all human trafficking offenses: (1) a penalty enhancement where the actor "recklessly causes the offense by displaying or using what is, in fact, a dangerous weapon or imitation dangerous weapon;" and (2) a penalty enhancement where, "at the time of the offense, in fact, the complainant is under 12

[18] Report of the Committee on the Judiciary, *Justice for Victims of Trafficking Act of 2015*, Report 114-7 (114th Congress, 1st Session), at 6.

years of age, and the actor is at least 4 years older than the complainant." A penalty enhancement for using a dangerous weapon reflects the increased severity of committing any offense—let alone a human trafficking offense—that involves a dangerous weapon. A penalty enhancement for a human trafficking offense against a victim who is under the age of 12 reflects the increased severity of trafficking particularly young child. Increasing the severity of the offense based on the child being under age 12 is also consistent with the sexual offense provisions, which create a separate gradation for committing Sexual Abuse of a Minor against a child under 12, and create a separate penalty enhancement for committing Sexual Assault against a child under 12.

Bases for Liability

USAO-DC recommends including additional conduct as a basis for liability for several trafficking offenses. USAO-DC proposes the following language for Trafficking in Labor, RCCA § 22A-2603(a)(1), Trafficking in Forced Commercial Sex, RCCA § 22A-2604(a)(1), Sex Trafficking of a Minor or Adult Incapable of Consenting, RCCA § 22A-2605(a)(1), and Trafficking in Commercial Sex, RCCA § 22A-5403(a)(1). USAO-DC proposes the following language in those sections: "Knowingly recruits, entices, houses, transports, provides, obtains, ~~or~~ maintains, advertises, patronizes, or solicits by any means, a person." These changes track federal human trafficking law, as codified in 18 U.S.C. § 1591(a)(1). These additions would include, for example, a job posting or similar situations that would arguably not be encompassed in the statute otherwise.

Coercion

The RCCA replaces use of the word "coercion" in the human trafficking and other contexts with the word "coercive threat." *See* RCCA § 22A-101(17). USAO-DC recommends the following amendments to the definition of "coercive threat" in RCCA § 22A-101(17).

> "(F) ~~Restrict~~ Facilitate or control a person's access to an addictive or controlled substance ~~that the person owns~~, or a prescription medication ~~that the person owns~~; or
> (G) Engage in fraud or deception; or
> (H) ~~(G)~~ Cause any harm that is sufficiently serious, under all the surrounding circumstances, to compel a reasonable person of the same background and in the same circumstances as the complainant to comply; or
> (I) Knowingly participate in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable person in that person's circumstances to believe that he or she is the property of a person or business."

For purposes of human trafficking, "coercion" is defined under current law as follows:

> " 'Coercion' means any one of, or a combination of, the following:
> (A) Force, threats of force, physical restraint, or threats of physical restraint;
> (B) Serious harm or threats of serious harm;
> (C) The abuse or threatened abuse of law or legal process;

(D) Fraud or deception;
(E) Any scheme, plan, or pattern intended to cause a person to believe that if that persons did not perform labor of services, that person or another person would suffer serious harm or physical restraint;
(F) Facilitating or controlling a person's access to an addictive or controlled substance or restricting a person's access to prescription medication; or
(G) Knowingly participating in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable person in that person's circumstances to believe that he or she is the property of a person or business."

D.C. Code § 22-1831(3).

The definition of a "coercive threat" includes coercion obtained by means of threats, and implicitly includes coercion obtained by means of force, but does include not coercion obtained by means of fraud. Fraud should remain a basis for coercion. For example, with respect to fraud in the human trafficking context, if a defendant were to falsely advertise modeling opportunities, and a victim presented herself to a perpetrator on that basis, but then became entangled in what truly was a scheme that culminated in commercial sex, that should be criminalized under this definition.

USAO-DC also recommends, consistent with current law, that this definition include situations where a victim is coerced by being supplied with an addictive or controlled substance or medication, even where the victim does not "own" the substance of medication. If the substance is addictive or medically necessary, it is irrelevant who has an ownership interest in the substance. Further, consistent with current law, coercion should also exist where the defendant "knowingly participates in conduct with the intent to cause a person to believe that he or she is the property of a person or business and that would cause a reasonable person in that person's circumstances to believe that he or she is the property of a person or business."

Accomplice Liability

The RCCA proposes removing accomplice and conspiracy liability for people who were a victim of the principal of the human trafficking offense within the last 3 years. *See* RCCA § 22A-1612. USAO-DC recommends removing this limitation. This is a change from current law, and limits the ability to prosecute individuals who were previously trafficked but are currently perpetrating trafficking. Even someone who was trafficked for a short time can become an essential part of the criminal enterprise. But-for that prior victim's involvement in the enterprise—now as an accomplice rather than as a victim—the primary trafficker would not be able to recruit new victims and continue to build a trafficking network. It is frequently the case that these accomplices are used as recruiting tools, or as enforcers in the enterprise who enforce the victims' compliance and allow the primary trafficker to appear sympathetic to these victims.

Additional Concerns

USAO-DC recommends that the RCCA clarify the enhancement that applies when a victim is trafficking for more than 180 days. USAO-DC recommends the following language:

"(2) *Penalty enhancements*. The penalty classification of this offense is increased by one class when the actor commits the offense:

(A) Reckless as to the fact that the complainant is under 18 years of age, or, in fact, the complainant is under 12 years of age; or

(B) By recklessly holding the complainant, or causing the complainant to provide commercial sex acts, during a period of time that exceeds ~~for a total of more than~~ 180 days."

As drafted, the language could mean that the victim must be caused to provide commercial sex acts or services on every one of the 180+ days, rather than repeatedly over the course of a period of time that exceeds 180 days. Victims are unlikely to remember exactly how many days forced labor or commercial sex occurred, as there may be some days on which no services or commercial sex acts occur in a given period of time during which the trafficking was occurring. However, victims are likely to be able to report the period of time over which trafficking was happening. The Commentary attempts to clarify current law, *see* Commentary on Subtitle I, at 406, but we want to ensure that the language refers to the overall time period, rather than requiring proof of discrete days.

Further, USAO-DC recommends that the Commentary expressly clarify that masturbation can qualify as "sexual contact" under RCCA § 22A-101(119) when it otherwise meets the elements. This is implied in the statute, but should be clarified by the Commentary. This is particularly relevant with respect to a "commercial sex act" under RCCA § 22A-101(18), which should include masturbation as a basis for liability.

Finally, in RCCA § 22A-2608, USAO-DC recommends adding the word "and" to the end of subsection (a)(2). This is not intended to be a substantive change.

Assault

Significant Bodily Injury

USAO-DC recommends that the definition of "Significant bodily injury" in RCCA § 22A-101(120) include the words "or a laceration for which the victim required or received stitches, sutures, staples, or closed-skin adhesives."

With USAO-DC's changes, this subsection would provide:

> " 'Significant bodily injury' means a bodily injury that, to prevent long-term physical damage or to abate severe pain, requires hospitalization or immediate medical treatment beyond what a layperson can personally administer, and, in addition, the following injuries constitute at least a significant bodily injury: a fracture of a bone, a laceration that is at least one inch in length and at least one quarter of an inch in depth, or a laceration

for which the complainant required or received stitches, sutures, staples, or closed-skin adhesives; a burn of at least second degree severity . . . ."

As the Commentary notes, *see* Commentary on Subtitle I, at 624 & n.30, under current law, lacerations requiring stiches are sufficient proof of significant bodily injury. *See, e.g.*, *Rollerson v. United States*, 127 A.3d 1220, 1232 (D.C. 2015); *In re R.S.*, 6 A.3d 854, 859 (D.C. 2010); *Flores v. United States*, 37 A.3d 866, 867 (D.C. 2011). There is no size requirement for lacerations requiring stitches. A layperson will likely not know the size of his or her laceration. Even if that layperson was able to measure the length of his or her own laceration, it would be nearly impossible for a layperson to measure the depth of his or her own laceration, particularly after stitches have been applied. Medical professionals often do not even measure the depth of a laceration, and measuring the depth of a laceration is not a standard procedure in a medical forensic evaluation. Thus, practically, every case involving this type of significant bodily injury would require medical testimony. This requirement is impractical, as medical testimony should not be required in every case to prove whether a significant bodily injury is present. Lay testimony about the required used of sutures is appropriate, and tracks current law. To allow a layperson to testify about the types of injuries he or she sustained, USAO-DC believes that inclusion of this language is necessary.

Further, USAO-DC recommends including "stitches, sutures, staples, or closed-skin adhesives" in this definition. These are all different tools that medical professionals use to close open lacerations. Medical professionals often decide which tool to use based on the location of the injury on the body and the medical professional's judgment, not exclusively based on the length or width of the injury.

Finally, USAO-DC recommends that the language provide that the victim "required or received" these treatments. This encompasses both situations where the victim actually received that treatment, and situations in which the victim should have received the treatment but did not. This is consistent with the beginning of the "significant bodily injury" definition providing "a bodily injury that . . . *requires* hospitalization or immediate medical treatment beyond what a layperson can personally administer." RCCA § 22A-101(120) (emphasis added).

Strangulation

USAO-DC strongly supports changes to the definition of "significant bodily injury" in RCCA § 22A-101(120) that have the effect of allowing strangulation-related injuries to result in felony liability. Strangulation is widely recognized as one of the most lethal forms of domestic violence, and categorizing that conduct as a misdemeanor under current law does not adequately reflect that lethality. A felony offense of strangulation will enable the District of Columbia to combat and prosecute strangulation in a manner proportionate with the seriousness of the conduct, and will allow the District to join the overwhelming majority of states in making this extremely dangerous—and potentially life-threatening—type of assault a felony.

However, USAO-DC believes that creating a stand-alone felony offense of strangulation is preferable to categorizing strangulation-related injuries as a type of felony assault. A stand-

alone offense of strangulation more appropriately captures and describes the conduct that is the subject of the offense. In addition, a stand-alone offense does not require proof of any level of injury, but rather focuses solely on the conduct. This recognizes that strangulation often results in no visible injuries, and should be classified as a felony regardless of the level of injury.

Penalty Enhancement

USAO-DC recommends adding a penalty enhancement to First Degree Assault where the offense is committed against a "protected person." First Degree Assault under RCCA § 22A-2202(a) is comparable to the offense of Mayhem under current law. There should be additional liability for committing this offense against a protected person—to include a child or vulnerable adult. Second Degree, Third Degree, and Fourth Degree Assault all include a "protected person" enhancement, and First Degree should do the same.

Carjacking

USAO-DC recommends creating a separate statutory provision for Carjacking, instead of subsuming Carjacking within Robbery. The RCCA substantively alters current D.C. law by eliminating the offense of carjacking—which is currently the subject of its own detailed and thorough statutory provision (D.C. Code § 22-2801)—and subsuming it within the Second Degree Robbery provision. *See* RCCA § 22A-2201(b)(3)(B)(ii). Appendix J provides: "[E]liminating carjacking as a separate offense is consistent with national norms, although the District would be in a small minority by continuing to recognize carjacking as a form of robbery. Of the twenty-nine reform jurisdictions distinguish carjacking as a form of robbery, and five include separate carjacking offenses in their codes." Appendix J, at 380. Appendix J identifies the five reformed jurisdictions that retain a separate offense of carjacking (*see* N.J. Stat. Ann. § 2C:15-2; 18 Pa. Stat. Ann. § 3702; 720 Ill. Comp. Stat. Ann. 5/18-3; Del. Code Ann. tit. 11, § 836; Tenn. Code Ann. § 39-13-404). There are two additional reformed jurisdictions that retain a separate carjacking statute. *See* Wi. St. 943.23(1r); Kan. St. 21-3716 (defining aggravated burglary to include entering a car when a person is present with intent to commit a felony). Furthermore, the states are split as it relates to this issue. 27 states do not have a separate carjacking statute and do not have a provision in their robbery statute regarding robbery of vehicles specifically.[19] Four states specifically categorize robbery of a motor vehicle as a type of robbery by statute.[20] 19 states have a carjacking or equivalent statute distinct from their robbery statute.[21] Moreover, the reformed jurisdictions identified in the commentary that distinguish

[19] Alabama, Alaska, Arizona, Arkansas, Colorado, Hawaii, Idaho, Iowa, Kansas, Kentucky, Maine, Minnesota, Montana, Nebraska, Nevada, New Hampshire, New Mexico, North Carolina, North Dakota, Ohio, Oklahoma, South Dakota, Texas, Vermont, Washington, West Virginia, and Wyoming.

[20] *See* N.Y. Pen. § 160.10; Or. Rev. Stat. § 164.395; R.I. Gen. Laws § 11-39-2; Utah Code § 76-6-302.

[21] *See* Cal. Pen. Code § 215; Conn. Gen. Stat. § 53a-126a; Del. Code Ann. tit. 11, § 836; Fla. Stat. § 812.133; O.C.G.A. § 16-5-44.1; 720 Ill. Comp. Stat. Ann. 5/18-3; 720 ILCS 5/18-3; La. R.S. 14:64.2; MD Code, Criminal Law, § 3-402; Mass. Gen. Laws ch. 265 § 21A; Mich. Comp. Laws § 750.529a; Miss. Code Ann. § 97-3-117; Mo. Rev. Stat. § 570.027; N.J. Stat. Ann. § 2C:15-2; 18 Pa. Stat. Ann. § 3702; S.C. Code § 16-3-1075; Tenn. Code Ann. § 39-13-404; Va. Code § 18.2-58.1; Wi. St. 943.23(1r).

carjacking within their robbery statutes generally treat carjackings as among the most severe forms of robbery. *See* Conn. Gen. Stat. Ann. § 53a-136a (providing a separate penalty for carjacking robberies and imposing a three-year mandatory minimum for such offenses); N.Y. Penal Law § 160.10 (treating carjacking as second degree robbery); Utah Code Ann. § 76-6-302 (defining aggravated robbery to include carjacking). By eliminating the separate carjacking statute and subsuming carjacking within Second Degree Robbery, the RCCA proposes a significant change to the current law. USAO-DC believes that Carjacking should remain a separate statutory provision.

Child Physical Abuse

Parental Defense

The RCCA codifies a "Parental Defense" in RCCA § 22A-405. This defense codifies several concepts that exists in the common law, including the reasonable parental discipline defense available under current law, and the concept of acting *in loco parentis*. The codification of this defense, however, exceeds current law in one respect, and should be modified to conform to current law. Under the RCCA, a person can invoke this defense either when they are "a parent, or a person acting in the place of a parent under civil law, who is responsible for the health, welfare, or supervision of the complainant," or when they are "acting with the effective consent of such a parent or such a person." RCCA § 22A-405(a)(1)(B).

Allowing a person acting with the effective consent of a parent or person acting in the place of a parent to invoke this defense would constitute an inappropriate change in the law. In support of this proposed change, the Commentary states: "There is no relevant statute and current D.C. case law does not address whether the defense is available to persons acting with the effective consent of parents or those acting in loco parentis, let alone whether a reasonable mistake by the actor as to the existence of effective consent is sufficient. To resolve this ambiguity, the RCCA parental defense is available to persons acting with such effective consent or reasonably believing they have such effective consent. This change improves the clarity and proportionality of the revised statutes." Commentary on Subtitle I, at 346-47. This defense, however, recognizes that there may be certain limited disciplinary conduct that society regards as within appropriate limits, but that would not be appropriate for a non-parent. For example, it is unclear if, under this proposal, a babysitter or a teacher could physically discipline a child. The babysitter or teacher would be acting with the effective consent of a parent to watch the child, and may be acting with the effective consent of a parent to discipline a child in some manner, but may exceed the scope of the effective consent by physically disciplining the child. Further, even if a parent effectively consented to a babysitter or teacher physically disciplining a child, it may not be appropriate for the law to allow a babysitter or teacher to physically discipline a child in this manner.

Penalty Enhancement for Abuse of a Minor or Vulnerable Adult or Elderly Person

USAO-DC recommends creating a penalty enhancement for the offenses of Criminal Abuse of a Minor under RCCA § 22A-2501 and Criminal Abuse of a Vulnerable Adult or

Elderly Person under RCCA § 22A-2503 when the offense is committed with a dangerous weapon or imitation dangerous weapon. Committing this offense with a dangerous weapon could include, among other possibilities, committing this offense with a firearm or other dangerous weapon such as a belt, knife, sharp object, or other object likely to cause injury. USAO-DC recommends that all assaultive statutes—including these statutes—create an enhancement for the commission of the offense with a dangerous weapon or imitation dangerous weapon.

Relationship Requirement for Abuse of a Minor or Vulnerable Adult or Elderly Person

USAO-DC recommends, in RCCA § 22A-2501 and RCCA § 22A-2503, removing the requirement that the actor have a "responsibility under civil law for the health, welfare, or supervision of the complainant." This is a change from current law for both statutes, and is not warranted. Under D.C. Code § 22-1101, the current Cruelty to Children offense, there is no requirement of a relationship between the parties. USAO-DC relies on this statute both in situations where there is a relationship between the parties and when there is not, and both applications of the statute are appropriate. For example, if a stranger walks up to a child and tips over the child's stroller, or a neighbor hits a child, this behavior is equally culpable as when a person with a relationship with the child engages in the same behavior. Under D.C. Code § 22-933, the current Criminal Abuse of a Vulnerable Adult or Elderly Person offense, there is no requirement of a relationship between the parties. USAO-DC relies on this statute both in situations where there is a relationship between the parties and when there is not, and both applications of the statute are appropriate. Alternatively, the relationship could be included as an enhancement to this provision.

Theft

USAO-DC recommends lowering the monetary thresholds for theft and other offenses that rely on similar monetary thresholds. The RCCA proposes the following monetary threshold for theft:

- First Degree Theft (Property has a value of $500,000 or more)—Class 7 felony
- Second Degree Theft (Property has a value of $50,000 or more)—Class 8 felony
- Third Degree Theft (Property has a value of $5,000 or more, or the property is a motor vehicle)—Class 9 felony
- Fourth Degree Theft (Property has a value of $500 or more, or the property is taken from a victim who possesses the property within the victim's immediate physical control)—Class A misdemeanor
- Fifth Degree Theft (Property has any value)—Class C misdemeanor

USAO-DC recognizes that, to account for inflation and other factors, it is appropriate to raise the felony threshold for theft above the $1,000 mark that existed when the statute was codified. A felony threshold of $2,500, rather than $5,000, is a more appropriate mark. USAO-DC also recommends increasing the gradation of theft that would qualify as a Class A misdemeanor to $1,000, and creating a Class B gradation that would require either a theft of $500 or more, or the theft of a phone. A phone is a common object that is stolen, and would

benefit from a clear gradation. There is also a significant gap in liability between a Class A misdemeanor—punishable by 1 year incarceration—and a Class C misdemeanor—punishable by 60 days' incarceration—so USAO-DC recommends a middle gradation at 180 days' incarceration.

Further, the monetary thresholds for the top gradations are so high that the top gradations will likely only be used very rarely, if ever. USAO-DC therefore recommends lowering the top gradation to $100,000. A theft of $100,000 is a significant amount, and still merits a substantial penalty.

Financial Exploitation of a Vulnerable Adult or Elderly Person

For similar reasons as discussed above, USAO-DC recommends lowering the top threshold for this offense to $100,000. Creating such a high threshold for the more serious gradation of this offense diminishes the value of this charge, and does not adequately reflect the seriousness of a loss of even $100,000 to a victim of this offense.

Further, USAO-DC recommends that, consistent with current law, the statute create liability where the defendant uses "deception" or "intimation" as a means of taking funds, not just where there is "undue influence" or the commission of a separate offense. There are situations where liability for this offense should attach, and where the government can prove the existence of deception or intimidation, but not necessarily undue influence. For example, when a victim has diminished capacity, it may be difficult or impossible to prove that they have the capacity to be influenced. But they may, however, be susceptible to intimidation, and may have been deceived. Moreover, the current statutory language recognizes that the intimidation or deception may be imposed on another person rather than the vulnerable adult or elderly person, and USAO-DC recommends that the statute remain consistent with current law in this respect.

Arson

USAO-DC recommends adding a penalty enhancement to Arson where the offense is committed against a "protected person." There should be additional liability for committing this offense against a protected person—to include a child or vulnerable adult. When the victim of any arson is a protected person, that crime should be punished more severely.

Burglary

USAO-DC recommends removing the requirement that a person who is not a participant in the burglary be inside "and directly perceives the actor or is entering with the actor." This is a change from current law, which only requires that, to be liable for First Degree Burglary, "any person [be] in any part of such dwelling or sleeping apartment at the time of such breaking and entering, or entering without breaking." *See* D.C. Code § 22-801(a). Consistent with current law, it is sufficient to require that the defendant be reckless as to the fact that a person who is not a participant in the burglary is inside. Liability for burglary should not turn on whether another person who is, in fact, inside directly perceives the actor or enters with the actor. At a minimum,

this should be changed to require that the defendant be reckless that a person who is not a participant in the burglary "may directly perceive the actor or enter with the actor."

The RCCA also proposes, as a basis for liability for Burglary, that a person is liable for Burglary either if they enter a dwelling or building with intent to commit a crime, *or* if they surreptitiously remain in a dwelling or building with intent to commit a crime. USAO-DC strongly supports the addition of language to incorporate unlawfully "remaining" in a location as a basis for liability for Burglary. This change fills a gap in current law that will bring the D.C. Code in line with the majority of state statutes with respect to Burglary. 32 states today have burglary laws that allow liability for "remaining." Of those 32, 18 states explicitly allow for intent to be formed any point during the "remaining." *See* Brief of Respondent at 23-24, *Quarles v. United States*, 139 S. Ct. 1872 (2019) (citing Colo. Rev. Stat. § 18-4-201(3) (2017); Del. Code Ann. tit. 11, § 829(d) (2015); Haw. Rev. Stat. Ann. § 708-812.5 (LexisNexis 2016); Mich. Comp. Laws Ann. § 750.110a(4)(a) (West 2004); Minn. Stat. Ann. §§ 609.581(4), 609.582(3) (West 2018); Mont. Code Ann. § 45-6-204(1) (2017); Tenn. Code Ann. § 39-14-402(a)(3) (2018); Tex. Penal Code Ann. § 30.02(a)(3) (West Supp. 2018)). An additional ten states have judicial decisions also allowing for intent to be formed at any point during the remaining. *See* Brief of Respondent at 21-22, *Quarles v. United States*, 139 S. Ct. 1872 (2019), ((citing pre-1986 cases); Braddy v. State, 111 So. 3d 810, 844 (Fla. 2012) (per curiam); State v. Walker, 600 N.W.2d 606, 609 (Iowa 1999); State v. DeNoyer, 541 N.W.2d 725, 732 (S.D. 1995); State v. Rudolph, 970 P.2d 1221, 1228-1229 (Utah 1998); State v. Allen, 110 P.3d 849, 853-855 (Wash. Ct. App. 2005); *see also* Pet. Br. 49-51 (classifying Ohio and Utah as ambiguous only in respect to pre-1986 law)). Further, two Supreme Court decisions have confirmed that "remaining" burglary statutes appropriately qualify as burglary. *Quarles v. United States*, 139 S. Ct. 1872, 1877 (2019) ("The Court concluded that generic burglary under § 924(e) means "unlawful or unprivileged entry into, *or remaining in* , a building or structure, with intent to commit a crime." (emphasis added)) (citing *Taylor v. United States*, 495 U.S. 575 at 599 (1990). Congress made burglary a predicate violent felony under the Armed Career Criminal Act in 1986. U.S. Code § 924(e). 29 states at that time included "remaining" burglary laws to encompass situations where the defendant forms the intent to commit a crime while remaining unlawfully in a location, thus reflecting the inherent risks involved in burglary crimes. "That risk turns on the intruder's intent to commit a crime in someone else's home or other structure, not on whether he had that intent at the precise moment his unlawful presence began or developed it later while he remained. A resident or other victim who encounters the intruder will ordinarily not know—let alone care—about the timing or sequence by which the intruder developed the requisite intent. From the victim's perspective, what matters is that he or she has encountered a criminally-minded intruder." Brief of Respondent at 9, *Quarles v. United States*, 139 S. Ct. 1872 (2019). The RCCA proposal appropriately recognizes that "remaining" burglaries should be a form of burglary liability, and brings the District's code in line with the majority of states.

While USAO-DC supports the addition of language to incorporate unlawfully "remaining" in a location as a basis for burglary, USAO-DC recommends removing the word "surreptitiously" from the proposal. There is no reason to believe that an intruder who remains "surreptitiously" is more dangerous than an intruder who, for instance, makes no effort to hide their unlawful remaining but is nevertheless not discovered until later. Burglary is an "inherently

dangerous crime" (*Stitt v. United States*, 139 S. Ct. 399 at 406 (2018)), and this danger is not related to the manner in which an intruder unlawfully remains. In fact, none of the factors that make burglary inherently dangerous depend on the manner in which an intruder remains. The risk of a violent confrontation, the violation of personal privacy, and the defendant's culpability all exist whether an intruder has attempted to remain "surreptitiously" or not. "Once the intruder is both (1) unlawfully present inside a structure and (2) has the requisite intent to commit a crime, all of the practical concerns that led Congress to include 'burglary' as an ACCA predicate apply with full force. At that point, the defendant is an intruder into a private space; he is bent on committing a crime; and a resident or other person who encounters him is unlikely to know—or care—how long before the encounter he hatched his criminal plan." Brief of Respondent at 30, *Quarles v. United States*, 139 S. Ct. 1872 (2019). The same is true for the manner by which an intruder remains. Similarly, "the victim's terror and sense of invasion, the possibility that the victim will defend himself or herself and the home through violent force, and the possibility that the perpetrator will initiate violence when encountered, will all be the same, regardless of how long before the encounter the intruder made up his mind to violate the law." Brief of Respondent at 30, *Quarles v. United States*, 139 S. Ct. 1872 (2019). Accordingly, USAO-DC recommends that liability attach for Burglary where the defendant either "enters" a dwelling or building with intent to commit a crime, or "remains" in a dwelling or building with intent to commit a crime, whether or not the remaining was "surreptitious."

Criminal Contempt

USAO-DC recommends that the Commentary to RCCA § 22A-1329A clarify that a court can order a person who is detained to comply with certain conditions. In the Commentary to this offense, a footnote provides: "Disobedience of these and other court orders are also punished under D.C. Code §§ 11-741 and 11-944. *See Caldwell v. U.S.*, 595 A.2d 961, 965–66 (D.C. 1991). The statute does not apply to a person who is detained. *That is, a person cannot be subject to pretrial or presentencing conditions if they are detained in the same case. For example, no statutory or other authority exists under District law for a judicial officer to order a defendant held at D.C. Jail and order that the defendant have no contact with a witness.*" Commentary on Offenses Outside Title 22 and Offenses Recommended for Repeal, at 500 n.4 (italics added). USAO-DC recommends that the italicized sentences be removed from the Commentary. Although the Commentary appropriately notes that *this* offense is limited to violations of conditions where the defendant is not detained, it is not accurate to state that there is *no* authority under District law for a judicial officer to order a defendant held at D.C. Jail and order that the defendant have no contact with a witness. A judge may issue an order other than one listed in D.C. Code § 23-1321, and, as the footnote discusses earlier, a court can punish violations of other court orders under the general contempt provisions of D.C. Code §§ 11-741 and 11-944. D.C. Code § 23-1330 provides: "Nothing in this subchapter shall interfere with or prevent the exercise by any court of the United States of its power to punish for contempt."

USAO-DC previously raised this issue before the CCRC, and the CCRC responded that they were unaware of any authority under current District law for the government to request or a criminal court to order conditions for a person who is not released. In Appendix D, on page 723, the CCRC noted that there is statutory authority to preventatively detain a person*, see, e.g.*, D.C.

Code §§ 23-1322(a); 23-1325(a), and there is statutory authority to release a person on conditions, *see* D.C. Code § 23-1321(c)(1), however, there is no statutory authority to do both. The CCRC further stated that, although it may occur routinely in practice, imposition of such an order appears to be illegal, noting that the power that judges in the Superior Court of the District of Columbia have to issue orders derives from statutes that were passed by the D.C. Council and later became law, *see In re T.K.*, 708 A.2d 1012 (D.C. 1998); *see also Salvattera v. Ramirez*, 105 A.3d 1003 (D.C. 2014).

As a threshold matter, USAO-DC believes that this is permissible under current law. A court has inherent authority to issue orders. *See., e.g.*, *Hicks-Bey v. United States*, 649 A.2d 569, 575 (D.C. 1994) ("[T]he trial court has inherent authority, unless otherwise specifically precluded, to control the conduct of the proceedings before it, in order to ensure that the proper decorum and appropriate atmosphere are established, that all parties are treated fairly, and that justice is done."). Further, in *Baker v. United States*, 891 A.2d 208 (D.C. 2006), the D.C. Court of Appeals was presented with the question of whether the trial court had authority to issue a no-contact order when the appellant was preventatively detained. Although the court declined to rule on this question, the court said: "Although this case does not oblige us to resolve the issue, the notion that the statutory authority to detain on grounds of dangerousness does not include the power to order a detainee to avoid indirect contact—say, through telephone calls—with a person or persons to whom he presents a potential danger is decidedly counter-intuitive. *Cf. Oliver v. United States*, 682 A.2d 186 (D.C.1986) (reaffirming, in context of pretrial release, court's power "to order a party to take action not specifically prescribed by statute"). *Baker*, 891 at 212 n.11.

Moreover, even though USAO-DC believes this is permissible under current law, to the extent that there is any ambiguity in existing law, USAO-DC recommends that the Council clarify this issue through legislation. The court's ability to order a detained defendant to comply with certain conditions—to include a stay away/no contact order—is a crucial way to ensure a victim's safety. A person who is incarcerated still has access to a phone and can write letters, and can contact a victim in that manner. It can be terrifying for a victim to be contacted by a person who assaulted or abused them, even when that person is incarcerated. Further, stay away/no contact orders frequently bar a defendant from either directly contacting a victim or contacting that victim through a third party. Absent a stay away/no contact order, a defendant could therefore instruct another person to contact or approach the victim, which can also be terrifying.

Possession of a Dangerous Weapon During a Crime

The RCCA proposes that First Degree Possession of a Dangerous Weapon During a Crime applies when a person possesses a firearm, and Second Degree applies when a person possesses an imitation firearm or dangerous weapon. *See* RCCA § 22A-5106. USAO-DC opposes creating different gradation for possession of a firearm and possession of an imitation firearm.

There is no reason to have separate gradations for a firearm and imitation firearm. If a firearm is not recovered, it is impossible to tell if it is a real firearm or an imitation firearm.

Imitation firearms are intended to look like real firearms, and often cannot be distinguished without test-firing them, or otherwise checking them for operability. Thus, if a defendant holds up a gun to a victim and flees the scene with the gun, and the gun is not recovered (which is a common situation), it will, practically, be impossible to prove whether that gun was real or imitation. A defendant should not be subject to a more favorable gradation simply because the defendant flees the scene and officers are not able to recover the gun. When a weapon is used "in furtherance of and while committing" an offense—as is required by the statute—it should be irrelevant if the firearm is real or imitation; both will be terrifying to a victim.

Possession of a Firearm by an Unauthorized Person

Prior Intrafamily Offense

USAO-DC recommends removing the restriction on which intrafamily offenses qualify as predicate offenses under RCCA § 22A-5107(b)(2)(B)(iii). USAO-DC therefore recommends that this subsection provide: "(iii) An intrafamily offense, as that term is defined in D.C. Code § 16-1001(8), ~~that requires as an element confinement, a sexual act, sexual contact, bodily injury, or threats,~~ or a comparable offense, committed within 5 years of the current possession of a firearm."

By limiting the predicate offenses to ones that involve, among other things, bodily injury, the RCCA substantially limits the offenses that are eligible as predicate offenses. Possession of a firearm is particularly dangerous in the domestic violence context, and liability for possession of a firearm by a person previously convicted of a domestic violence offense should not be limited to certain types of intrafamily offenses. Current law, appropriately, has no such limitation, *see* D.C. Code § 22-4503(a)(6), and USAO-DC recommends tracking current law in this respect.

Prior Felony Conviction

USAO-DC recommends removing the 10-year limitation for prior felony convictions in subsection (b)(2)(B)(i). Under current law, there is no such limitation. *See* D.C. Code § 22-4503(a)(1). The nature and seriousness of the crime, however, is the same, regardless of how much time has passed since the conviction. Moreover, by calculating the 10 years from the date of conviction, instead of from the date of release from incarceration or termination of supervision, a person who receives a 10-year sentence of incarceration under this provision could be permitted to possess a gun immediately upon release from incarceration, even while still on supervision for this offense. USAO-DC accordingly recommends removing this 10-year limitation.

Final Civil Protection Order or Final Anti-Stalking Order

The RCCA proposes liability for this offense where a person who is "is subject to a final civil protection order issued under § 16-1005 or a final anti-stalking order issued under § 16-1064" possesses a firearm. RCCA § 22A-5107(b)(2)(C). USAO-DC supports barring a person who is subject to a final civil protection order or a final anti-stalking order from possessing a

firearm. However, USAO-DC recommends, consistent with current law, that liability also attach where a person is subject to a court order that restrains the person from assaulting, harassing, stalking, or threatening the petitioner or any other person named in the order, and that requires the person to relinquish possession of any firearms.[22] *See* D.C. Code § 22-4503(a)(5). It is appropriate for liability to attach in this situation—for example, where a person is on pretrial release in a criminal case, and has been ordered to not threaten a victim, and also to relinquish firearms. Although USAO-DC supports expressly including civil protection orders and anti-stalking orders in this language, USAO-DC also wants to ensure that liability is not limited from current law.

Trafficking of a Controlled Substance

USAO-DC recommends removing the defense in proposed section 401b(i)(1) that creates a defense for distribution or possession with intent to distribute where an actor "does not do so in exchange for something of value or expectation of future financial gain from distribution of a controlled substance and either the quantity of the controlled substance distributed does not exceed the amount for a single use by the recipient, or recipient plans to immediately use the controlled substance."

As the Commentary acknowledges, creating this defense represents a change from current law. *See* Commentary on Offenses Outside Title 22 and Offenses Recommended for Repeal, at 532-33. This defense is problematic. If a person possesses drugs with intent to distribute them, but there is no proof of distribution, it will often be impossible for the government to overcome this defense. For example, despite possessing a large quantity of drugs that a drug expert would opine is more consistent with intent to distribute than personal use, a defendant could claim that they had no intention to distribute them in exchange for value. The defendant could claim, instead, that they possessed such a large quantity for the purpose of distributing them with friends. It will be difficult for the government to overcome this claim beyond a reasonable doubt, even where it is not true. Thus, although the RCCA's intent in creating this defense was to create a defense for those who gift or share a controlled substance, in reality, it may allow traffickers to rely on this defense to justify their possession of quantities that are not intended for mere small gifts. Notably, the CCRC acknowledges that this defense is not supported by national legal trends, and that only one of the 29 reformed code jurisdictions has

[22] USAO-DC also recommends that this subsection be modified to include a stay away/no contact order. Current law at D.C. Code § 22-4503(a)(5)(B) contains a gap in liability. The law applies to a defendant who is subject to an order that restrains the actor from assaulting, harassing, stalking or threatening any person (a "no HATS" order), but does not include a defendant who is subject to a stay away/no contact order. A stay away/no contact order is a stricter order than a no HATS order, and a defendant who possesses a firearm while under a court order requiring the defendant to stay away from/have no contact with a victim (while also ordered to relinquish firearms) should be treated the same way as a defendant subject to a no HATS order. Although judges sometimes impose both a stay away/no contact order and a no HATS order, judges also sometimes just impose one type of order. In addition, there could be circumstances where a judge orders a defendant to stay away from a location where a victim lives or where an offense took place, and does not order the defendant to stay away from the victim. USAO-DC therefore recommends including a stay away from both a person and a location in the modified language. This gap in liability should be addressed by modifying the language to provide: "Restrains the actor from assaulting, harassing, stalking, or threatening any person, or requires the actor to stay away from, or have no contact with, any person or a location."

adopted this defense. *See* Appendix J, at 622. The RCCA should stay in line with current law and the overwhelming majority of other jurisdictions, and remove this defense.

Failure to Appear

USAO-DC recommends that the defense proposed in RCCA § 23-586(c)(2) (Failure to Appear After Release on Citation or Bench Warrant Bond) and the defense in RCCA § 23-1327(c)(2) (Failure to Appear in Violation of a Court Order) be modified to an affirmative defense. In both sections, the RCCA proposes creating the following defense: "It is a defense to liability under this section that, in fact, the actor makes good faith, reasonable efforts to appear or remain for the hearing."

Under the RCCA, the existence of a "defense" means: "If there is any evidence of a statutory defense at trial, the government must prove the absence of at least one element of the defense beyond a reasonable doubt." RCCA § 22A-201(b)(2). The existence of an "affirmative defense" means: "An actor has the burden of proving an affirmative defense by a preponderance of the evidence." RCCA § 22A-201(b)(3).

Whether the actor makes "good faith, reasonable efforts to appear or remain for the hearing" is more appropriately an affirmative defense than a defense. An affirmative defense would recognize that there may be situations where, for example, a person is stranded due to a bus cancellation, unable to connect to a virtual hearing due to a technological problem, or hospitalized. These situations, however, are situations that the defendant is aware of, and that the government would not be able to prove the absence of. Even where the defendant presents "any evidence" of this defense at trial, it may be impossible for the government to prove the absence of the elements of this defense. For example, a defendant may present evidence at trial that they were hospitalized at the time of the offense, without any further evidence of which hospital. The government may not be able to ascertain which hospital the defendant was committed to, and even if the government can ascertain the hospital, may be limited in our ability to access the defendant's relevant medical records—particularly if the government does not have prior notice of the defense before trial. By contrast, a defendant will readily have evidence of, for example, hospital discharge records or other evidence that could prove that they were admitted to a hospital at the time of the failure to appear. A defendant could also offer other proof—which could include the defendant's testimony or other evidence—of their bus breaking down, a serious injury, etc.

We agree that it is not appropriate to attach liability for failure to appear when a defendant made good faith, reasonable efforts to come to court, but was unable to do so due to circumstances beyond their control. However, making this an affirmative defense, rather than a defense that the government must prove the absence of beyond a reasonable doubt, recognizes that the defendant will typically be the only party able to provide proof that they made all reasonable efforts to appear following a failure to appear.

General Provisions

Judicial Dismissal for Minimal or Unforeseen Harms

USAO-DC recommends removing RCCA § 22A-213, which allows a court to dismiss a prosecution where the court finds that there were only minimal or unforeseen harms. There is no such defense under current D.C. law, and as the DCCA has recognized, the defense has been adopted by only a "very limited" number of other jurisdictions. *See Dunn v. United States*, 976 A.2d 217, 223 (D.C. 2009) ("a few other states have adopted [de minimis] provisions based on Model Penal Code § 2.12 (2001), which 'authorizes courts to exercise a power inherent in other agencies of criminal justice to ignore merely technical violations of law.' *Id.*, Explanatory Note; *see* Stanislaw Pomorski, *On Multiculturalism, Concepts of Crime, and the 'De Minimis' Defense*, 1997 B.Y.U. L. Rev. 51 & n. 2; *see, e.g.*, N.J. Stat. Ann.. 2C:2–11 (2005); Me. Rev. Stat. Ann. 17–A, § 12 (2006); 18 Pa. Cons. Stat. § 312 (1998). The D.C. Council, however, has not joined ranks with the 'very limited' number of states that have adopted the defense. Pomorski, 1997 B.Y.U. L. Rev. 51."). Instead, USAO-DC believes that, as is currently the case, any characterization of the offense as "de minimis" may be considered at the sentencing phase (e.g., as supporting an argument for leniency at sentencing) rather than the guilt phase of the proceedings.

Moreover, there are certain cases where the evidence introduced at trial may only involve what appear to be relatively minimal harms, but where the prosecution is in the broader interests of justice. For example, in a domestic violence situation, there may be a broad history and course of violence and abuse in the relationship. This broad history may not be before the court in a particular prosecution, but may have been a reason justifying the prosecution. It may not be legally appropriate to introduce additional facts about the broader background at trial, or there may be situations where it is inappropriate for the government to publicly share additional facts at trial. Even when the court permits the defendant's prior criminal conduct or bad acts to be introduced at trial, it is unclear whether this proposed defense would allow consideration of those additional facts—or facts that are not part of the record—as part of its dismissal analysis.

Term of Supervised Release

Among other modifications to the requirements regarding the imposition of a term of supervised release, the RCCA proposes that D.C. Code § 24-403.01(b)(2)(C) provide that a judge shall impose a term of supervised release of not more than 1 year, if the maximum term of imprisonment authorized for the offense is less than 8 years. Offenses with a maximum term of imprisonment of less than 8 years would include Third Degree Assault (including domestic violence strangulation), certain sexual offenses, and other offenses that can be relatively serious. For many offenses, a 1-year term of supervision may not be a sufficient period of supervised release. Accordingly, USAO-DC recommends removing the proposed language in D.C. Code § 24-402.01(b)(2)(C).

Rather than capping the maximum term of supervised release at 1 year, the RCCA proposal to allow a judge discretion to impose a term of less than 3 years of supervision where the maximum term of imprisonment authorized is less than 24 years provides a judge with the option of imposing a term of 1 year of supervised release where appropriate. This discretion accounts for the situations where a 1-year term of supervised release could be appropriate. The

fact that a 1-year period of supervision may not be sufficient in all cases was implicitly recognized by the DC Council in the recent passage of the "Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020" (Law 23-0275, effective April 27, 2021). That law modified the term of a civil protection order from an initial term of up to 1 year to an initial term of up to 2 years. In support of that change, the Committee Report cited to the testimony of the Legal Aid Society of the District of Columbia as follows: "There are many situations in which a one-year order simply is not enough. For example, the abuse may be egregious that a client will still be fearful in a year's time, or a survivor may need more than a year to secure a safety transfer to an apartment somewhere safe from their abuser." Report on Bill 23-0181, the "Intrafamily Offenses and Anti-Stalking Orders Amendment Act of 2020," Committee on the Judiciary & Public Safety, Council of the District of Columbia, at 11 (Nov. 23, 2020). This logic applies equally—if not more forcefully—to felony offenses. Moreover, it would not be consistent for a period of supervision in a civil protection order (that could stem from a misdemeanor offense) to last up to 2 years with the possibility of extension, and for a period of supervision in a felony case to last only up to 1 year.

Crime of Violence

In RCCA § 22A-101(27), the RCCA proposes defining "crime of violence" as follows:

(A) Murder under § 22A-2101;
(B) Manslaughter under § 22A-2102;
(C) Robbery under § 22A-2201;
(D) First degree, second degree, and third degree assault under § 22A-2202(a)-(c);
(E) Enhanced first degree criminal threats under § 22A-2203(a) or (d)(4)(B);
(F) First degree, second degree, and third degree sexual assault under § 22A-2301(a)-(c);
(G) First, second, fourth, and fifth degree sexual abuse of a minor under § 22A-2302(a), (b), (d), or (e);
(H) Kidnapping under § 22A-2401;
(I) Enhanced criminal restraint under § 22A-2402(a) or (d)(2);
(J) First and second degree criminal abuse of a minor under § 22A-2501(a)-(b);
(K) First and second degree criminal abuse of a vulnerable adult or elderly person under § 22A-2503(a)-(b);
(L) Forced labor under § 22A-2601;
(M) Forced commercial sex under § 22A-2602;
(N) Trafficking in labor under § 22A-2603;
(O) Trafficking in forced commercial sex under § 22A-2604;
(P) Sex trafficking of a minor or adult incapable of consenting under § 22A-2605;
(Q) Enhanced first degree and enhanced second degree burglary under § 22A-3801(a), (b), or (d)(4); or
(R) For any of the offenses described in subparagraphs (A)-(Q) of this paragraph, a criminal attempt under § 22A-301, a criminal solicitation under § 22A-302, or a criminal conspiracy under § 22A-303.

Under current law, the term "crime of violence" is defined as:

> aggravated assault; act of terrorism; arson; assault on a police officer (felony); assault with a dangerous weapon; assault with intent to kill, commit first degree sexual abuse, commit second degree sexual abuse, or commit child sexual abuse; assault with significant bodily injury; assault with intent to commit any other offense; burglary; carjacking; armed carjacking; child sexual abuse; cruelty to children in the first degree; extortion or blackmail accompanied by threats of violence; gang recruitment, participation, or retention by the use or threatened use of force, coercion, or intimidation; kidnapping; malicious disfigurement; manslaughter; manufacture or possession of a weapon of mass destruction; mayhem; murder; robbery; sexual abuse in the first, second, or third degrees; use, dissemination, or detonation of a weapon of mass destruction; or an attempt, solicitation, or conspiracy to commit any of the foregoing offenses.

D.C. Code § 23-1331(4).

In support of eliminating several offenses from the "crime of violence" definition, the Commentary provides: "The exclusion of [arson and other offenses] from the definition of crime of violence does not reflect that such crimes involving threatening or risk-creating conduct are not serious, but rather focuses the definition on crimes that require or typically include actual violence." Commentary on Subtitle I, at 475. However, consistent with current law, USAO-DC recommends retaining the following offenses in the RCCA "crime of violence" definition.

Enhanced Fourth Degree Assault should be included in the "crime of violence" definition. "Assault with a Dangerous Weapon" is included in the current definition of crime of violence under D.C. Code § 23-1331(4). Under the RCCA proposal, there is no longer a separate offense of Assault with a Dangerous Weapon. Rather, the conduct traditionally punishable as Assault with a Dangerous Weapon can be either punished as Enhanced Fourth Degree Assault (if the assault results in bodily injury and was committed with a dangerous weapon or imitation dangerous weapon, or a higher level of Assault if there is significant or serious bodily injury), or as Enhanced First Degree Criminal Threats (if the assault is an intent-to-frighten assault and was committed with a dangerous weapon or imitation dangerous weapon). The crime of violence definition accounts for what has been traditionally prosecuted as intent-to-frighten Assault with a Dangerous Weapon with the inclusion of Enhanced First Degree Criminal Threats, and should similarly account for what has traditionally been prosecuted as attempted-battery Assault with a Dangerous Weapon by including Enhanced Fourth Degree Assault. Causing bodily injury to person by use of a firearm is a both serious and violent offense, and should be categorized accordingly.

Consistent with current law, First and Second Burglary—whether enhanced or unenhanced—should be included in the "crime of violence" definition. As discussed throughout, Burglary—whether armed or unarmed—is a serious violation that may result in significant harm. Although it does not necessarily involve any physical injuries, it can leave a significant harm on a victim, and should be recognized as a violent crime.

Consistent with current law, Arson should be included in the "crime of violence" definition. Arson is a serious crime that involves knowingly starting a fire that destroys a dwelling or building—First and Second Degree require that a person actually be inside the dwelling or building when the first is started. Arson can cause a significant harm, and should be similarly recognized as a violent crime.

For clarification, USAO-DC also recommends that the statutory text include the language that is currently in the Commentary: "Enhanced version of the enumerated offenses are also included within the definition." Commentary on Subtitle I, at 461.

Comparable Offenses

USAO-DC recommends that the statute or the Commentary be revised to state that a conviction under the predecessor District statute to the RCCA statute is a "comparable offense." The RCCA definition of "comparable offense" is "an offense committed against the District of Columbia, a state, a federally-recognized Indian tribe, or the United States and its territories, with elements that would necessarily prove the elements of a corresponding *current* District offense." RCCA § 22A-101(19) (emphasis added). RCCA statutes will inherently have different elements from statutes under current law, so the current versions of those offenses will, in many cases, not have "elements that would necessarily prove the elements of a corresponding" offender under the RCCA.

It is important that convictions under the current D.C. Code qualify as prior convictions for purposes of the Repeat Offender Penalty Enhancement, or as a basis for liability for the offense of Possession of a Firearm by an Unauthorized Person. For example, the elements of robbery under current law are different from the elements of robbery under the RCCA. If a defendant perpetrated an armed robbery under current law, that defendant's conviction would not "necessarily prove the elements" of the RCCA offense of Enhanced Third Degree Robbery, even if the defendant's actual conduct for which they were convicted would be subject to liability under the comparable RCCA offense. This is similarly true for other offenses, as the RCCA has elementized each offense in more detail, and added elements to many offenses that may not exist in current law. This creates a gap in liability, as many defendants who should be eligible for this enhancement—and held liable for offenses that rely on a prior conviction or "comparable offense"—will not be held accountable for those enhancements and offenses. To address this concern, the Commentary could indicate that, unless otherwise specified, the predecessor offense under current law is a "comparable offense" to the RCCA version of that offense.

Mental State Clarification

USAO-DC recommends clarifying, in RCCA § 22A-206(e)(2), that proof of intent, knowledge, or purpose would satisfy recklessness, including recklessness with extreme indifference to human life. With USAO-DC's changes, subsection (e)(2) would provide:

"*Proof of recklessness*. When the law requires recklessness, including recklessness with extreme indifference to human life, as to a result element or circumstance element, the requirement is also satisfied by proof of intent, knowledge, or purpose."

Under the RCCA, Second Degree Assault (akin to aggravated assault) only provides clear liability where a person, with extreme indifference to human life, causes serious bodily injury. The plain language of the statute, as drafted, could be interpreted as vague as to whether liability would attach where a person "knowingly" or "purposely" caused serious bodily injury. Under current law, liability for aggravated assault attaches either: (1) where the actor intended to cause serious bodily injury to the victim; (2) knew that serious bodily injury to the victim would result from the actor's conduct, or (3) was aware that the actor's conduct created an extreme risk of serious bodily injury to the victim and, under circumstances which demonstrated an extreme indifference to human life, engaged in that conduct nonetheless. Criminal Jury Instruction 4.103 (Aggravated Assault). Although the hierarchy of mental states would clearly allow proof of intent, knowledge, or purpose to satisfy the general recklessness standard, USAO-DC recommends that the RCCA clarify that proof of knowledge, intent, or purpose would also satisfy this gross recklessness standard.

For aggravated assault (Second Degree Assault), this would mean that liability could attach both where a person recklessly, with extreme indifference to human life, caused serious bodily injury, *and* where a person knowingly caused serious bodily injury. This is appropriate and consistent with current law. Where there is proof that the act was done "knowingly," that necessarily requires proof of more than a conscious disregard for the risk of serious bodily injury, regardless of whether that risk is substantial or extreme. The RCCA already clarifies this for Murder, which creates liability both where a person recklessly, with extreme indifference to human life, caused the death of another person, or where a person knowingly caused the death of another person. *See* RCCA § 22A-2101(b).

GOVERNMENT OF THE DISTRICT OF COLUMBIA
EXECUTIVE OFFICE OF THE MAYOR
OFFICE OF VICTIM SERVICES AND JUSTICE GRANTS

OVSJG
Office of Victim Services and Justice Grants

December 21, 2021

The Honorable Charles Allen
Chairperson
Committee on the Judiciary and Public Safety
Council of the District of Columbia
1350 Pennsylvania Ave. NW
Washington, DC 20004

Dear Chairperson Allen:

Thank you for holding a hearing on B24-0416, the Revised Criminal Code Act of 2021, on December 16, 2021. As Deputy Mayor Geldart testified, the Executive has concerns over several elements of the bill and I am writing to address three: 1) the proposed revisions to stalking, 2) the proposed revisions to sexual assault, and 3) the use of the term "complainant" rather than "victim."

SUBCHAPTER VIII. STALKING, OBSCENITY, AND INVASIONS OF PRIVACY
The revised code is a significant rewrite of the existing code, however, not for the better. As written, it is difficult to understand, awkward, and reads like it was written without consultation of either the Model Anti-Stalking Code or the Model Stalking Code Revisited (see attached). Additionally, it is crafted with elements that do not exist in any other state law and reflects an outdated understanding of stalking. Specific concerns include:

- It artificially separates stalking and electronic stalking which is contrary to the actual behavior of stalkers/experiences of stalking victims. It also is problematic that it's only cognizable if the victim discovers it.
- *Exclusions from liability*. The liabilities carve out is concerning. While almost all state stalking laws have protections for law enforcement and/or private investigators, this goes well above and unnecessarily expands the language in the current statute that addresses constitutionally protected activity. As written, it is unclear if someone could legally stalk a public official by showing up at official events they attend, calling/emailing them at work, and posting about/at them on social media as long as they couch their contact and communications as related to their job.
- (c) *Unit of prosecution*. Defining all activity within 24-hours as a single occasion again does not reflect the actual experience of stalking. Stalkers can do so much harm in a single 24-hour period.

SUBCHAPTER III. Sexual Assault and Related Provisions.
As written, sex offenses are largely characterized by use or threat of force or a victim who is unable to consent due to incapacity and while this isn't a significant departure from the current code, it doesn't seemingly include a scenario where a victim just does not consent, absent force or threat of force or incapacity.

Just in August 2021, the American Law Institute approved a revised Model Penal Code on sexual assault. It should be reviewed for additional guidance. It's almost 500 pages, but a quick scan highlighted the following:

> "Over the past half-century, the principle that frames the sexual offenses has shifted from force and coercion to the absence of consent. Updating the MPC to reflect this shift was a primary motivation for the Institute's decision to revise Article 213. And because absence of consent, rather than only force, coercion, or incapacity, can now support conviction, the reach of sexual-offense law has justifiably expanded in most American jurisdictions and around the world."

Complainant vs. Victim
The bill largely uses the term "complainant" rather than "victim" and defines complainant as "a person who is alleged to have been subjected to the criminal offense." The use of "alleged" incorrectly asserts that victim status has not been determined or that it is questionable if the person experienced a crime. If alleged by definition, at what point in the criminal justice process does it become factual? Only if someone is adjudicated as guilty of the crime?

If a victim's status has not been determined, do established victims' rights apply? Local and federal laws establish multiple rights for DC crime victims/survivors, including

a. DC Crime Victim's Bill of Rights (23-1901)
b. DC Victims' Rights in the Juvenile Justice System (16-2340)
c. Sexual Assault Victims' Rights Act
d. Federal Crime Victims' Rights Act (18 U.S.C. § 3771)
e. Federal Sexual Assault Survivors' Bill of Rights (Public Law 114 – 236).

Additionally, if one is not a victim, is one eligible for Crime Victims' Compensation?

Complainant, as it is defined and used in the bill, is in conflict with the common legal understanding of complainant as one who applies to the courts for legal redress; one who exhibits a bill of complaint. A crime is committed against someone and whether they apply to a court for redress or exhibit a bill of complaint, a crime has still occurred. In many cases, criminal prosecutions occur without a complainant or complaining witness, (e.g., homicide, domestic violence) and this does not change the status of person as a victim of a crime.

The National Crime Victim Law Institute offers an in-depth analysis of this issue in the article, *Use of the Term "Victim" In Criminal Proceedings*. The article notes that "when the use of the term 'victim' is at issue, courts tend to distinguish cases in which it is such as 'alleged victim' or 'complainant' to identify those who meet the relevant jurisdiction's constitutional and/or statutory definition of victim. These alternative labels are inappropriate as they fail to recognize a victim's legal status. Referring to a victim in such a manner implies that the victim is not truly a victim, but is instead fabricating the charges. This connotation is a clear violation of a victim's right to be treated with dignity and respect. For a victim to truly

be a respected participant in the criminal justice system, a court must allow use of the term 'victim' in court proceedings as acknowledgment that the individual occupies an important legal role in the process."

The article further goes on to note that "when the use of the term 'victim' is at issue, courts tend to distinguish cases in which it is uncontested that a crime has occurred and only the identity of the perpetrator is at issue, from those cases that involve a question of whether a crime occurred at all. Courts have consistently found that it is appropriate to use the term 'victim' in a criminal trial where the commission of a crime is not contested. In these cases, defendants' objection to the term loses most, if not all, merit because it is clear that harm has occurred and there is a 'factual' – as well as legal – victim. For this reason, courts have concluded that the term 'victim' carries no more implication of defendant's guilt than the facts of the crime, and have permitted its use accordingly. Use of the term 'victim' is more controversial in cases where the defendant is contesting that a crime occurred."

I hope this additional information is useful. Please do not hesitate to contact me should you have any questions. I can be reached at michelle.garcia@dc.gov or 202-724-7216.

Sincerely,

Michelle M. Garcia

Michelle M. Garcia
Director

Enclosure

The Model Stalking Code *Revisited*

Responding to the New Realities of Stalking

THE NATIONAL CENTER FOR Victims of Crime

National Center for Victims of Crime

The National Center for Victims of Crime is the nation's leading resource and advocacy organization dedicated to serving individuals, families, and communities harmed by crime. The mission of the National Center is to forge a national commitment to help victims of crime rebuild their lives. Working with local, state, and federal partners, the National Center:

- Provides direct services and resources to victims of crime throughout the country;
- Advocates for laws and public policies that secure rights, resources, and protections for crime victims;
- Delivers training and technical assistance to victim service organizations, counselors, attorneys, criminal justice agencies, and allied professionals serving victims of crime; and
- Fosters cutting-edge thinking about the impact of crime and the ways in which each of us can help victims rebuild their lives.

A Leader in Responding to Stalking

The National Center for Victims of Crime has long led the field in enhancing our country's response to stalking by advocating for key stalking legislation and policy at the federal and state level. In 2000, the National Center established the Stalking Resource Center to increase public awareness about stalking and help communities across the country develop multidisciplinary responses to this insidious crime. As the only national training and technical assistance center focused solely on stalking, the Stalking Resource Center has provided training to tens of thousands of victim service providers and criminal justice practitioners throughout the United States and has fostered innovations in programs for stalking victims and practitioners who support them.

For more information, please contact:
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The Model Stalking Code *Revisited*

Responding to the New Realities of Stalking

January 2007

THE NATIONAL CENTER FOR Victims of Crime

Acknowledgements

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The National Center for Victims of Crime wishes to acknowledge the outstanding efforts of the 23 members of the Model Stalking Code Advisory Board who contributed an extraordinary wealth of knowledge and expertise to this project.

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The Model Stalking Code *Revisited*

Table of Contents

Section 1 Introductory Overview

The National Center for Victims of Crime has developed *The Model Stalking Code Revisited: Responding to the New Realities of Stalking* to assist states that are working to strengthen their stalking laws. This report examines and recommends updates to the 1993 *Model Anti-Stalking Code for the States* developed at the direction of Congress by the National Institute of Justice, U.S. Department of Justice.[1]

Introduction

How to Use This Document

The Model Stalking Code Revisited: Responding to the New Realities of Stalking suggests legislative language that may be used to better define and address the current realities of stalking, hold stalkers accountable, and enhance the safety of stalking victims.

States may use this document as a guide to analyze current stalking statutes and to identify changes needed in their law.[2] The statutory language recommended in this report and the accompanying commentary are designed to

1 National Criminal Justice Association, *Project to Develop a Model Anti-Stalking Code for States*, (Washington, DC: National Institute of Justice, U.S. Department of Justice, 1993).

2 The model legislation offered in this document is also applicable to territories and tribes. For ease of writing and reading, we have chosen to use only "states" throughout this document.

help legislators, criminal justice and victim assistance professionals, and others work toward amending current laws by expanding their awareness of the range of options available to them and of the impact that legislative language and structure can have on the enforcement of the law.

Document Roadmap

This document is presented in four sections. **Section One** provides an overview that includes a historical perspective of stalking legislation, a rationale for revisiting the 1993 *Model Anti-Stalking Code for the States,* and a description of the process used to update the code. **Section Two** provides model language for state stalking laws. **Section Three** provides a detailed commentary on each section of the model legislation, and **Section Four** provides a summation. The **Appendices** provide additional resource materials, including the 1993 *Model Anti-Stalking Code for the States*; a fact sheet produced by the Stalking Resource Center of the National Center for Victims of Crime that provides a comprehensive overview of all current relevant data on stalking; and the *Strengthening Antistalking Statutes Bulletin*, published by the Office for Victims of Crime, U.S. Department of Justice.

Historical Perspective

The criminalization of stalking occurred only after several high-profile cases, including the 1989 murder of actress Rebecca Schaeffer, gained national attention. Prior to its common usage and designation as a crime, stalking was referred to as harassment, obsession, or in some cases, domestic violence.

Stalking is a crime of intimidation and psychological terror that often escalates into violence against its victims. Stalkers can destroy the lives of victims, terrorizing them through a course of conduct that may include monitoring, following, threatening, or harassing victims in a variety of ways. Stalking often has devastating consequences for victims. Many are forced to profoundly alter their lives—going as far as relocating to another state and changing their identities—to protect themselves and their families.

Victims' experiences vary greatly—both the actual experience of being stalked and the subsequent interactions with the criminal justice system and

victim services field. The victim experience is largely dependent on the extent to which state laws hold offenders accountable and help keep victims safe.

In 1990, California enacted the first state stalking law. Since then, all fifty states, the District of Columbia, and the federal government have passed laws criminalizing stalking. In 1996, Congress criminalized interstate stalking as a federal offense, later amending the statute to include stalking via electronic communications.[3] An amendment adopted in 2006 expanded the federal stalking statute to include conduct which causes the victim substantial emotional distress.[4] The new law also added language that would cover surveillance of a victim by a global positioning system (GPS).[5]

Following the introduction of federal and state stalking laws—which vary greatly in scope and severity of penalties—law enforcement officers, prosecutors, and victim service providers began to steadily strengthen their response to stalking and their support for victims. But, as will be discussed later in this section, the laws have not kept pace with rapidly evolving stalking methods and have, in fact, posed serious barriers to law enforcement officers and prosecutors in making arrests and securing convictions.

1993 Model Anti-Stalking Code

In 1993, Congress directed the National Institute of Justice (NIJ) at the U.S. Department of Justice to develop a model anti-stalking code to encourage states to adopt anti-stalking measures and to provide them with direction in drating such laws.[6] NIJ entered into a cooperative agreement with the National Criminal Justice Association (NCJA) to research existing stalking laws and develop model legislative language. NCJA sought additional expertise and input from the National Conference of State Legislatures, the American Bar Association, the National Governors' Association, the Police Executive Research Forum, the National Center for Victims of Crime, and other national organizations.

3 18 U.S.C. § 2261A(2006).

4 18 U.S.C. § 2261A(2)(B).

5 18 U.S.C. § 2261A(2)(A).

6 U.S. Departments of Commerce, Justice, and State, and the Judiciary and Related Agencies Appropriations Act for Fiscal Year 1993, Pub. L. No. 102-395, § 109(b).

When NCJA drafted the original anti-stalking code, many states had yet to enact stalking statutes, and stalking laws that had been enacted were new and untested in the courts. Because few courts had ruled on any constitutional challenges to stalking laws, the drafters created a model law designed to withstand the legal arguments that experts predicted at the time.

The 1993 *Model Anti-Stalking Code for the States* served as an excellent template for its time, an important early step toward ensuring that state criminal justice systems responded appropriately to stalking crimes. Many states incorporated provisions of the original model code when drafting or expanding their state stalking statutes, and some courts referred to the model law when interpreting provisions in state stalking laws. (See Appendix A of this document for the 1993 model anti-stalking code.)

Rationale for Revisiting the 1993 Model Anti-Stalking Code

Since the 1993 model anti-stalking code was developed, much more is known about the behavior of stalkers and the effectiveness of state stalking laws.[7] We have witnessed an alarming rise in the use by stalkers of sophisticated—yet widely available—tracking and monitoring technology. We also now possess quantifiable national data that documents the prevalence and severity of stalking.

These developments strongly suggest the need for revisiting and updating the original model stalking code so that it reflects the current realities of stalking.

Research on Stalking

Until recently, very little empirical data was available about stalking in the United States. A more accurate picture of stalking began to emerge with the release of results from three major studies: the National Violence Against Women Survey in 1998, the Intimate Partner Stalking and Femicide Study in 1999, and the National Sexual Victimization of College Women Survey

7 In 1993, the drafters titled the sample law the "Model Anti-Stalking Code for the States." Due to the current practice across the country of labeling such state laws "stalking laws" instead of "anti-stalking laws," the updated sample law is called the "Model Stalking Code for the States."

in 2000.[8] These studies provided new data on the prevalence of stalking, the relationship between victim and stalker, the lethality of stalking, and common stalking behaviors.[9]

According to the National Violence Against Women Survey, an estimated 1.4 million people are stalked annually in the United States. This means that one in 12 women and one in 45 men will be stalked at some point in their lives.[10] Seventy-eight percent of stalking victims are women, and 74 percent are between the ages of 18 and 39. Overall, 87 percent of stalkers are men: ninety-four percent of women and 60 percent of men are stalked by men. Seventy-seven percent of female stalking victims (and 64 percent of male victims) are stalked by someone they know, and 59 percent of female stalking victims (and 30 percent of male victims) are stalked by an intimate partner or former intimate partner.[11]

The Intimate Partner Stalking and Femicide Study, which studied female murder victims who had been killed by intimate partners, found that 76 percent of femicide victims and 85 percent of attempted femicide victims had been stalked by their intimate partners in the year prior to their murders.[12]

The National Sexual Victimization of College Women Survey showed a particular vulnerability within a specific subgroup of victims, with thirteen percent of college women reporting that they had been victimized by a stalker in one six- to nine-month period.[13] Consistent with the findings from other stud-

8 Tjaden and Thoennes, "Stalking in America"; Judith McFarlane et al., "Stalking and Intimate Partner Femicide," *Homicide Studies* 3, number 4 (November 1999); Bonnie Fisher, Francis T. Cullen, and Michael G. Turner, *Sexual Victimization of College Women*, (Washington, DC: National Institute of Justice, U.S. Department of Justice, 2000).

9 Beginning in 2006, stalking will be included in the annual *National Crime Victimization Survey*, conducted annually by the Bureau of Justice Statistics, U.S. Department of Justice, providing a reliable and regularly updated source of data on stalking prevalence rates.

10 Tjaden and Thoennes, "Stalking in America," 3.

11 Ibid., 5-6.

12 McFarlane et al., "Stalking and Intimate Partner Femicide," 308. Femicide is the murder of a female.

13 Fisher, Cullen, and Turner, *Sexual Victimization of College Women Survey*, 27.

ies, more than 80 percent of these women knew their stalker, who was often a current or former boyfriend.[14]

These landmark studies shed new light on specific stalking behaviors. The most commonly reported stalking behaviors were surveillance behaviors, such as following or spying on the victim, or waiting outside the victim's home, work, or school. Unwanted phone calls, letters, and gifts were also commonly reported by victims. Fewer than 50 percent of victims reported being directly threatened by their stalkers. (For additional stalking data, see the stalking fact sheet in Appendix B of this document.)

Significance of These Studies. The findings from this research provide crucial cues to drafters of stalking legislation. The research shows, for example, that stalking is often linked closely with intimate partner violence. Law enforcement experts and victim advocates understand intimate partner violence as a pattern of controlling behavior that one intimate partner directs at another. When a victim leaves an abusive relationship, the risk of violence actually increases because the victim has challenged the perpetrator's unilateral exercise of power and control. The perpetrator often lashes out violently toward the victim in an attempt to retain or regain power and control. This "separation violence" often includes both stalking and physical violence.[15] Stalking laws need to be drafted in such a way that law enforcement can intervene as early as possible in intimate partner situations, before behaviors escalate into more serious violence.

The research also shows that surveillance is the most common type of stalking behavior victims experience. Stalkers can now terrorize their victims in almost any environment. Additionally, stalkers inflict terror and severe emotional distress without ever communicating direct or overt threats. Stalkers

14 Ibid., 28.

15 "Stalking in America: The National Violence Against Women Survey," by Tjaden and Thoennes, documented the danger of separation violence by asking women who had been stalked by their former husbands or partners at what point in the course of the relationship the stalking had occurred. Twenty-one percent of the victims said the stalking occurred only before the relationship ended; 43 percent said it occurred only after the relationship ended; and 36 percent said it occurred both before and after the relationship ended. Callie Marie Rennison and Sarah Welchans, in "Special Report: Intimate Partner Violence," with results drawn from the *National Crime Victimization Survey*, also found that divorced or separated persons were subjected to the highest rates of intimate partner victimization.

torment their victims, who often cannot perform everyday tasks such as answering their phones, reading their mail, or using their computers without fear of unwanted contact from the person who is stalking them.

The variability of stalking behaviors suggests that laws must be broad enough to address stalking in all its forms.

Stalking through New Technology

Stalkers increasingly use technology to surveil, monitor, track, and terrorize victims. When the original model anti-stalking code and most of the state stalking statutes were drafted in the early 1990s, many of today's technologies did not exist or were not affordable or readily available to the public. New, affordable technology has fundamentally and profoundly changed the way stalkers monitor and initiate contact with their victims. A stalker no longer needs to be in close proximity to his victim to monitor or surveil her. He can use a global positioning system (GPS) to track her in her car as she travels to virtually any location. He can put a small hidden camera (often called a "spycam") in his victim's home and have access to even the most private moments of her life. He can put a spyware program on her computer and intercept all of her e-mails and Internet searches.

All of these forms of technological stalking can be done from a distance—something that was not anticipated when the early stalking laws were drafted to prohibit physically following and pursuing another person. In the early 1990s, many stalking laws required physical proximity to satisfy the definition of stalking—a requirement made irrelevant by the new widely available monitoring technology.

Stalkers' use of e-mail to contact victims has prompted many jurisdictions to pass so-called "cyberstalking" laws. While these laws provide another means of holding stalkers accountable, enacting multiple statutes that criminalize different types of stalking behavior has significant drawbacks. Stalkers often use a variety of methods to terrorize victims, and the course of conduct required under many stalking laws is established by looking at the totality of the stalker's conduct. Passing separate laws for stalking and cyberstalking often creates unintended consequences such that prosecutors have trouble choosing the statute under which to prosecute a case. The bifurcation of stalking laws,

for example, can make it difficult to collect sufficient evidence to convict under one or the other statute.

In addition, cyberstalking laws typically only address stalking committed through the Internet (cyberspace). Instead of a state passing a new law to cover each new method of stalking, the focus should be on drafting a single law that covers stalking by any method, whether in person or by vehicle, telephone, pager, GPS, e-mail, spycam, or other means. The challenge is to enact laws that address stalking perpetrated through all of the currently known technologies, as well as through future technologies not yet developed or available to stalkers.

The National Center Experience

For nearly two decades, the National Center for Victims of Crime has led the field in enhancing our country's response to stalking. Since the enactment of the country's first state stalking law in 1990, the National Center has supported scores of legislators and victim advocates across the country in their efforts to pass state stalking laws or strengthen existing laws.

The National Center has also played a pivotal role in shaping federal stalking law by providing technical assistance to lawmakers, commenting on proposed legislation, and testifying before Congress. The National Center was critical in ensuring that legal protections keep pace with technology by advocating that the federal stalking statute include stalking behaviors that occur via the Internet or by other electronic means, such as tracking by GPS.

In 2000, the National Center established the Stalking Resource Center, the only national training and technical assistance center focused solely on stalking. The Stalking Resource Center has provided training to tens of thousands of victim service providers and criminal justice practitioners throughout the United States and has fostered innovations in programs for stalking victims and practitioners who support them.

The National Center operates the National Crime Victim Helpline, 1-800-FYI-CALL, through which victims receive one-on-one support to help them understand the impact of crime, access victim compensation, develop safety plans, navigate the criminal justice and social service systems, learn about their legal rights and options, and find the most appropriate local services. Nearly one-fifth of the calls received by the National Center come from

stalking victims, many of whom relay disturbing experiences with a criminal justice system that poses significant hurdles to making stalkers accountable for this crime.

The National Center's extensive stalking policy and training experience and its regular interaction with law enforcement professionals, victim service providers, and victims of crime have provided a unique insight into the inadequacies of the nation's current body of stalking laws. We've learned that:

- Stalkers often can "get away" with their criminal behavior and continue to wreak havoc on a victim's life with little or no risk of intervention by law enforcement.
- The burden of proof is so high under many stalking laws that it is extremely difficult to secure convictions.
- In most jurisdictions, stalking is only a misdemeanor crime, and sentences longer than a few days or weeks are rare. Most stalkers spend a remarkably short time in custody if and when they are arrested, prosecuted, and convicted.
- Statutory provisions written with the "stranger" stalker in mind restrict the types of stalking behavior that can be prosecuted when the stalker and victim are in a relationship.
- Without a full appreciation of the role of *context* in a stalking situation—the private meaning of certain behaviors that would not necessarily be evident to an outside observer—many stalking behaviors can be viewed as harmless, when in fact the behaviors may terrify the victim. A love letter left on the doorstep of a victim's apartment, for example, might seem benign to a law enforcement officer. Without knowing the context, the officer cannot fully appreciate how terrifying that apparently harmless gesture is for a victim who believed her stalker did not know where she was.
- Current state laws do not address the full range of stalking behaviors, making it virtually impossible to arrest and prosecute an offender for many of those behaviors. Consider, for example, a situation in which a stalker is constantly watching and monitoring a victim's daily activities and has posted information about the victim on the Internet, but has never communicated directly with the victim or threatened the

victim in any way. If, as is often the case, the applicable statute requires proof of some type of communication or threatening contact by the stalker, it is unlikely that a stalking charge could be brought. Many state stalking laws simply do not address surveillance by stalkers with newer forms of technology that do not require proximity to or communication with the victim.

Constitutional Challenges

Broadening the definition of stalking to allow the criminal justice system to intervene before stalking escalates into violence is the ultimate goal. Changes in existing stalking laws, however, should always be made with careful consideration of constitutional limits established by the courts.

Since 1993, courts across the nation have heard appeals from defendants challenging their convictions on constitutional grounds, with stalking laws standing up to constitutional challenges time after time.

Many cases challenging the constitutionality of stalking laws have focused on one of two questions: (1) whether the statute is overbroad and therefore violates the First Amendment, or (2) whether the statute is vague and violates the Fifth and Fourteenth Amendments of the United States Constitution.[16]

Courts have determined that most stalking laws are not overbroad or vague and do not deny defendants their due process rights. Those cases in which courts have struck down stalking law provisions have helped legislators understand the constitutional parameters of stalking laws.[17] (For more detailed

16 Office for Victims of Crime, Office of Justice Programs, U.S. Department of Justice, "Strengthening Antistalking Statutes," *Legal Series Bulletin* 1 (January 2002): 3.

The First Amendment "doctrine of substantial overbreadth" allows a person to challenge a stalking statute on the grounds that it may be unconstitutionally applied to legal behaviors. The Fifth and Fourteenth amendments guarantee citizens due process rights, including effective notice of the behavior that is criminalized by stalking statutes. 16 Am. Jur. 2d *Constitutional Law* § 140 (2006).

A person may also challenge a stalking statute on the ground that the notice given (via the statute) is so vague that it leaves a person without knowledge of the nature of activity that is prohibited. 16B Am. Jur. 2d *Constitutional Law* § 920 (2006).

17 For example, in *Commonwealth v. Kwiatkowski*, 418 Mass. 543, 637 N.E.2d 854 (Mass. 1994), the court found the stalking statute unconstitutionally vague and overturned the defendant's conviction, but then interpreted the statute and defined exactly what type of behavior would be covered by the statute.

discussion on constitutional challenges to stalking laws, see "OVC Bulletin: Strengthening Antistalking Statutes," Appendix C.)

Process of Updating the Model Stalking Code

Legal Research

The National Center for Victims of Crime began this project by reviewing each state's stalking law and analyzing several elements in the laws, including:

- Prohibited acts
- Level of intent (general or specific)
- Type of fear required (reasonable person, actual fear, or both)
- Degree of fear (e.g., serious bodily injury or emotional distress)
- Target of stalker's acts (victim, victim's family, other third parties)
- Threat requirements
- Coverage of technology and surveillance
- Other miscellaneous or innovative provisions

These elements make up the core of almost all stalking laws, but the language and standards adopted by the states vary greatly. In fact, what constitutes a crime in one state may be completely legal in another. The variances in these elements determine what prosecutors must prove to hold stalkers accountable, as well what stalking victims must experience before the criminal justice system can intervene.

The Model Stalking Code drafting committee compared each state's treatment of the above elements. The specific findings of this research are integrated throughout "Commentary to the Code" in Section Three of this document.

The goal of this project is not necessarily to produce uniformity among the states on all of the reviewed elements, but rather to highlight common issues for states to consider in modifying existing or developing new laws.

Role of the Model Stalking Code Advisory Board

The National Center for Victims of Crime convened an advisory board of experts to review the drafting committee's legal research, identify key issues, and define the scope of problems that proposed legislative language should address. The advisory board also provided recommendations to the drafting committee

about each of the major legal elements of the model stalking code. Many of these recommendations have been incorporated into the updated model stalking code.

Advisory board members represented local stalking and domestic violence programs as well as national organizations, and included police officers, prosecutors, civil attorneys, judges, victim advocates, law professors, social workers, and researchers with a wealth of experience regarding stalking and legislative drafting. (See "Acknowledgements" on for complete advisory board participant list.)

Advisory board members shared their perspectives on how a model stalking law could address the stalking behaviors they observed in actual criminal stalking cases. (See following box.)

Box A. Examples of Stalking Behaviors State Laws Should Cover

The following list of stalking behaviors, generated by the Model Stalking Code Advisory Board, in no way reflects the full scope of possible actions in which a stalker might engage, but rather, provides key examples of behaviors the advisory board felt should be covered under a model code.

- Violating protection orders
- Using the legal system to harass a victim ("litigation abuse") by continuously filing motions for contempt or modifications, or by filing retaliatory protection order applications or criminal charges against victims
- Harassing a victim through visitation or custody arrangements
- Stalking a victim in the workplace
- Using surveillance in person, through technology, or through third parties
- Using the Internet or a computer to steal a victim's identity or to interfere with a victim's credit
- Engaging in obsessive or controlling behaviors
- Targeting third parties (e.g., a victim's family member, friend, or child) to scare a victim
- Committing burglary or trespassing or moving items in a victim's home
- Killing animals
- Using cultural context to stalk or scare a victim, such as immigration-related threats
- Attempting to harm self in a victim's presence
- Sending flowers, cards, or e-mail messages to a victim's home or workplace
- Contacting a victim's employer or forcing a victim to take time off from work
- Using humiliating or degrading tactics such as posting pictures of a victim on the Internet, or disseminating embarrassing or inaccurate information about a victim
- Following a victim without the victim's knowledge with the intent of sexually assaulting her
- Assaulting a victim
- Using children to harass or monitor a victim
- Impersonating a victim through technology or other means

Section 2
Model Stalking Code for the States

This section provides the text for the updated "Model Stalking Code for the States," which states are encouraged to consider when reviewing and modifying their existing stalking laws. Although legislation is written and presented differently from state to state, the following sections of the model stalking code are representative of a format commonly used by state legislatures.

Section One	Legislative Intent
Section Two	Offense
Section Three	Definitions
Section Four	Defenses
Optional Provisions	
Section Five	Classification
Section Six	Jurisdiction

Model Stalking Code for the States

Section One: Legislative Intent

The Legislature finds that stalking is a serious problem in this state and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that causes a long-lasting impact on the victim's quality of life, and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time. The Legislature recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. Therefore, the Legislature enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has serious or lethal consequences.

The Legislature intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable for a wide range of acts, communications, and conduct. The Legislature recognizes that stalking includes, but is not limited to, a pattern of following, observing, or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means.

Section Two: Offense

Any person who purposefully engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person to:

(a) fear for his or her safety or the safety of a third person; or

(b) suffer other emotional distress

is guilty of stalking.

Section Three: Definitions

As used in this Model Statute:

(a) "Course of conduct" means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils,

threatens, or communicates to or about, a person, or interferes with a person's property.

(b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling.

(c) "Reasonable person" means a reasonable person in the victim's circumstances.

Section Four: Defenses

In any prosecution under this law, it shall not be a defense that:

(a) the actor was not given actual notice that the course of conduct was unwanted; or

(b) the actor did not intend to cause the victim fear or other emotional distress.

Optional Provisions

Section Five: Classification

Stalking is a felony.

Aggravating factors.

The following aggravating factors shall increase the penalty for stalking:

(a) the defendant violated any order prohibiting contact with the victim; or

(b) the defendant was convicted of stalking any person within the previous 10 years; or

(c) the defendant used force or a weapon or threatened to use force or a weapon; or

(d) the victim is a minor.

Section Six: Jurisdiction

As long as one of the acts that is part of the course of conduct was initiated in or had an effect on the victim in this jurisdiction, the defendant may be prosecuted in this jurisdiction.

Section 3
Commentary to the Code

The following commentary explains, section-by-section, the rationale for the language chosen by the drafters of the "Model Stalking Code for the States," as presented in Section Two of this document. The analysis and commentary also provide alternative options states may want to consider in crafting their own legislation. The drafters recognize that states have different statutory limitations, guidelines, and political climates that may dictate the use of language other than that recommended in this document.

SECTION ONE: LEGISLATIVE INTENT

The Legislature finds that stalking is a serious problem in this state and nationwide. Stalking involves severe intrusions on the victim's personal privacy and autonomy. It is a crime that can have a long-lasting impact on the victim's quality of life, and creates risks to the security and safety of the victim and others, even in the absence of express threats of physical harm. Stalking conduct often becomes increasingly violent over time. The Legislature recognizes the dangerous nature of stalking as well as the strong connections between stalking and domestic violence and between stalking and sexual assault. Therefore, the Legislature enacts this law to encourage effective intervention by the criminal justice system before stalking escalates into behavior that has even more serious or lethal consequences.

The Legislature intends to enact a stalking statute that permits the criminal justice system to hold stalkers accountable for a wide range of acts, communications, and conduct. The Legislature recognizes that stalking includes, but is not limited to, a pattern of following, observing, or monitoring the victim, or committing violent or intimidating acts against the victim, regardless of the means.

Analysis and Commentary

The updated "Model Stalking Code for the States" recommends that states set forth their legislature's intent to recognize stalking as a serious crime, encourage early intervention by the criminal justice system, and encompass a wide range of stalking behaviors in their stalking laws.

The 1993 model anti-stalking code did not include a legislative intent section. Several states, including Colorado and Nebraska, specifically express their legislature's intent in their stalking laws. While New York's legislature does not include a legislative intent section within the text of its stalking statute, such language was enacted in the same bill and is set out in the editor's notes which accompany New York's stalking law.[18]

The case of *People v. Ewing* is a good illustration of the importance of including a legislative intent provision.[19] In that case, the California Fourth District Court of Appeals unanimously reversed the defendant's stalking conviction. Because California's stalking law, Penal Code § 646.9, did not contain a legislative intent section, the court would have had to rely on the law's legislative history. After the enactment of Penal Code § 646.9 in 1993, the California legislature amended it many times to strengthen penalties against violators and to broaden the scope of protection for stalking victims. However, this history was apparently overlooked by the court. In an attempt to clarify the meaning of "substantial emotional distress," the court failed to consider the law's legislative history, in particular a 1996 amendment lowering the fear element of the law from the victim's "fear of death or great bodily harm" to "fear for his

18 N.Y. Penal Law § 120.45 (Consol. 2006), notes § 2.

19 *People v. Ewing*, 76 Cal. App 4th 199 (1999).

or her safety." This created a paradox between the legislative objectives underlying section 646.9 and its judicial interpretation. As was noted in an article evaluating the appellate court's analysis:

> The *Ewing* opinion did not adequately consider the legislative objectives that propelled the creation and subsequent amendments of Penal Code section 646.9. Instead, the outcome in *Ewing* creates a critical paradox in the successful prosecution of stalkers and protection of victims. While the legislature designed section 646.9 to preempt potential harm to victims, the *Ewing* court's decision implies that a stalker cannot be successfully prosecuted until the victim has sought medical treatment, psychological counseling, or some other form of assistance evidencing "substantial emotional distress." Theoretically, under *Ewing*, forcing victims to endure prolonged harassment while seeking other types of assistance before law enforcement will intervene, forces them to jeopardize their safety and their families' safety. This proposition clearly contradicts the legislature's intent to prevent harm to stalking victims.[20]

The first section of the model stalking code, which discusses legislative intent, emphasizes the gravity of stalking in our country. Although the prevalence of stalking may vary by state, a national study sponsored by the Centers for Disease Control and Prevention and the National Institute of Justice estimates that one in 12 women and one in 45 men in the United States will be stalked during her or his lifetime.[21] This section helps criminal justice professionals understand the seriousness of stalking by outlining the context in which the crime of stalking occurs and highlighting the impact of stalking on victims.

The legislative intent section also sets the tone for early intervention by the criminal justice system, particularly in jurisdictions where law enforcement may not have previously recognized the seriousness of stalking. This section acknowledges that stalking behavior often escalates over time and that the inability or unwillingness of the criminal justice system to promptly intervene may give some stalkers greater opportunity to engage in increasingly violent acts. It also recognizes the strong connections between stalking and other crimes, such as domestic violence and sexual assault.[22]

20 Julie A. Finney, "The Paradox of Actual Substantial Emotional Distress within the Context of California's Criminal Stalking Law," *W. St. U.L. Rev.* 341, number 29 (Spring 2002): 353-54.

21 Tjaden and Thoennes, "Stalking in America," 3.

22 Eighty-one percent of women who were stalked by a current or former husband or cohabiting partner were also physically assaulted by that partner, and 31 percent were sexually assaulted as well. Tjaden and Thoennes, "Stalking in America," 2.

Colorado's legislature recognized this need for earlier intervention in stalking cases as is evidenced by the following excerpt from the legislative intent section of its stalking statute:

> Because stalking involves highly inappropriate intensity, persistence, and possessiveness, it entails great unpredictability and creates great stress and fear for the victim. Stalking involves severe intrusions on the victim's personal privacy and autonomy, with an immediate and long-lasting impact on quality of life as well as risks to security and safety of the victim and persons close to the victim, even in the absence of express threats of physical harm. The general assembly hereby recognizes the seriousness posed by stalking and adopts [these] provisions…with the goal of encouraging and authorizing effective intervention before stalking can escalate into behavior that has even more serious consequences.[23]

This premise has also been recognized by courts interpreting stalking laws. As a Wisconsin court reasoned, "[Anti-stalking legislation] serves significant and substantial state interests by providing law enforcement officials with a means of intervention in potentially dangerous situations before actual violence occurs, and it enables citizens to protect themselves from recurring intimidation, fear-provoking conduct and physical violence."[24]

Finally, the model stalking code's legislative intent provision expresses the legislature's deliberate intention to cover a wide range of acts in its stalking law. It encompasses common stalking behaviors that police and prosecutors have identified in the past, but have been unable to address under many existing stalking laws. These include burglary or interfering with a victim's property—for example, entering a victim's home and moving objects around to communicate to the victim that the stalker has been there, or deflating the tires on a victim's car. Similarly, the law is designed to hold perpetrators accountable for using new forms of technology to stalk, such as surveillance of the victim through the use of global positioning systems, or using the Internet to track a victim's activities, steal a victim's identity, or interfere with a victim's credit.

Because stalking may be perpetrated both directly and indirectly against victims, the legislative intent section also seeks to expand the behaviors that

23 Colo. Rev. Stat. Ann. § 18-9-111(4)(a) (2005). Note, two sentences in the Model Stalking Code's legislative intent section closely track lines from Colorado's statute because it so powerfully describes the impact that stalking has on its victims' lives.

24 *State v. Ruesch*, 571 N.W.2d 898, 903 (Wis. App. 1997).

are covered by the statute to include indirect stalking behaviors. In the past, some state stalking laws have been limited to acts perpetrated by the stalker directly against the victim, such as when a stalker calls a victim repeatedly, follows him or her from place to place, or shows up at the victim's home uninvited. However, many stalkers use indirect means to threaten or monitor victims or even stalk through third parties. For example, stalkers may ask third parties to deliver gift packages to victims or post private information about the victim in public places or on the Internet, acts that may not seem dangerous unless taken in context. Stalkers may also indirectly intimidate or threaten the victim by making contact with the victim's employer, children, or other family members. Some stalkers have been known to use the power of the courts to maintain contact and control over victims by repeatedly filing civil or criminal cases against them.

The model stalking code's legislative intent provision recognizes that these types of behavior could constitute stalking if they meet the elements of the offense. Including the legislature's intent within the statutory language provides guidance to state courts, enabling them to liberally interpret a stalking law after enactment, rather than restricting the application of the law to a narrow set of acts.

The updated "Model Stalking Code for the States" encourages states to incorporate a legislative intent section in their stalking laws to highlight the seriousness of stalking and encompass a wide range of stalking acts so that the criminal justice system may intervene before the conduct escalates to violence.

SECTION TWO: OFFENSE

Any person who purposefully engages in a course of conduct directed at a specific person and knows or should know that the course of conduct would cause a reasonable person to:

(a) fear for his or her safety or the safety of a third person; or

(b) suffer other emotional distress

is guilty of stalking.

Analysis and Commentary

Level of Intent

The updated "Model Stalking Code for the States" recommends that states incorporate a general intent requirement into their stalking laws instead of a specific intent requirement.

Virtually every criminal code requires that the defendant intended to commit the actions that constitute a crime. With the crime of stalking, however, proving what the defendant intended by his or her action can be particularly difficult.

Generally, the intent requirement is divided into two categories—"general intent" and "specific intent."

"General intent" means that the stalker must intend the actions in which he or she is engaging (e.g., following, watching, or calling), but must not necessarily intend the consequences of those actions. In a jurisdiction with a general intent statute, a stalker who claims that he or she followed his or her ex-girlfriend or ex-boyfriend around every day for two months, but did not intend to frighten him or her, could still be found guilty of stalking, as long as he or she knows or should have known that his or her behavior would frighten a reasonable person.

"Specific intent" means that the stalker must intend to cause a specific reaction in the victim, such as fear for his or her own safety or the safety of others. According to the definition of specific intent from the American Jurisprudence second edition of *Criminal Law*, "Conviction with respect to a crime involving an element of specific intent requires the state to prove that the defendant intended to commit some further act, or intended some additional consequence, or intended to achieve some additional purpose, beyond the prohibited conduct itself."[25] Thus, a prosecutor in a jurisdiction with a specific intent stalking statute must prove that the stalker engaged in the prohibited behavior with the intent to cause the victim fear, emotional distress, or whatever other reaction is required by the statute.

25 21 Am. Jur. 2d *Criminal Law* § 128 (2006).

The 1993 model anti-stalking code also recommended the adoption of a general intent requirement. When it was drafted in 1993 only thirteen states had a general intent requirement in their stalking laws, and the others all had stalking laws with specific intent requirements. Currently, over half of states have some version of a general intent requirement in their stalking laws.[26] Some of states require only that the defendant intentionally committed prohibited acts.[27] Others require instead that, in committing the acts, he or she knew or reasonably should have known, that their actions would cause fear in a reasonable person.[28]

In a case interpreting the intent requirement of Iowa's stalking law, the court held that "the legislative choice of general over specific intent reflects sound public policy," noting that:

> Commentators have interpreted the [M]odel [C]ode to contain a general-intent provision. . . . Stalkers may suffer from a mental disorder that causes them to believe that their victim will begin to return their feelings of love or affection. . . . The drafters of the Model Code believed that the stalker's behavior, rather than his motivation, should be the most significant factor in determining whether to press charges. The Model Code's general intent requirement holds the accused stalker responsible for his intentional behavior if, at the very least, he should have known that his actions would cause the victim to be afraid. . . . By placing the focus on the stalker's behavior, the Model Code effectively eliminates the possibility that a stalker could assert a successful defense by claiming that he did not intend to cause the victim to be afraid, but was instead expressing his feelings and opinions.[29]

26 It often can be difficult to determine the intent element of a state's stalking law. In some states, stalking can be either a general or specific intent crime depending on the conduct. This count is based on the interpretation by the Model Code Drafting Committee of the statutory language of each state's stalking law.

27 *See*, for example, Ariz. Rev. Stat. § 13-2923 (2005); 11 Del. Code § 1312A (2005); Idaho Code § 18-7906 (2005); Me. Rev. Stat. Ann. tit. 17-A, § 210-A (2005); N.D. Cent. Code § 12.1-17-07.1 (2005); and Okla. Stat. Ann. tit. 21, § 1173 (West 2005).

28 *See*, for example, Iowa Code § 708.11 (2005); Md. Code Ann., Crim. Law §3-802 (2005); Minn. Stat. Ann. § 609.749 (West 2005); N.Y. Penal Law § 120.45 (Consol. 2005); Utah Code Ann. §76-5-106.5 (2005); Va. Code Ann. § 18.2-60.3 (Michie 2005); and Wash. Rev. Code Ann. § 9A.46.110 (West 2005).

29 *State of Iowa v. Neuzil*, 589 N.W.2d 708, 711-12 (Iowa 1999)(finding that reading a specific intent into the stalking statute would essentially negate its purpose), quoting Christine B. Gregson, Comment, "California's Antistalking Statute: The Pivotal Roles of Intent," *Golden Gate U.L. Rev.* 221, number 28 (1998): 244-45.

Prosecutors report difficulty proving stalking cases under specific intent statutes. They find that they must litigate what was in the defendant's mind when he or she engaged in the stalking behavior. In considering language for the model stalking code, the advisory board concluded that any person who purposefully engaged in a particular course of conduct that constituted stalking should be held accountable for stalking, regardless of whether the stalker intended to cause a particular reaction—such as actual fear—on the part of the victim. In other words, the fact that the perpetrator chose to engage in the conduct should be enough to prove that the conduct itself was intended and should satisfy the general intent requirement. "Where a particular crime requires only a showing of general intent, the prosecution need not establish that the accused intended the precise harm or precise result which resulted from his acts. For general intent crimes, the criminal intent necessary to sustain a conviction is shown by the very doing of acts which have been declared criminal; the element of intent is presumed from the actions constituting the offense."[30]

In addition to the heavy burden it places on prosecutors, a specific intent requirement loses sight of a critical issue: if the stalker's actions would cause a reasonable person to feel fear, the behavior should be actionable under criminal law. Minnesota has addressed this exact issue in its stalking statute by stating, "No proof of specific intent [is] required. In a prosecution under this section, the state is not required to prove that the actor intended to cause the victim to feel frightened, threatened, oppressed, persecuted, or intimidated, or…that the actor intended to cause any other result."[31]

Section Four ("Defenses") of the model stalking code reinforces that stalking is a general intent crime by specifically excluding as a defense that the actor did not intend to cause the victim fear or other emotional distress.

Fear Element—Standard of Fear

The updated "Model Stalking Code for the States" recommends that states utilize a "reasonable person" standard of fear instead of an "actual fear" stan-

30 21 Am. Jur. 2d *Criminal Law* § 127 (2006).

31 Minn. Stat. Ann. § 609.749 (West 2005).

dard, and that this standard be interpreted to mean "a reasonable person in the victim's circumstances."

A "reasonable person" standard of fear asks the question, "Would the perpetrator's conduct cause a reasonable person in similar circumstances to be afraid?"

An "actual fear" standard asks the question, "Did the defendant's conduct actually cause this particular victim to feel afraid?" thereby creating a burden of proof that can often only be satisfied by having the victim take the stand and testify in court.

The 1993 model anti-stalking code recommended that states incorporate a dual standard of fear: an objective "reasonable person" standard and a subjective "actual fear" standard.

At present, state stalking statutes vary in terms of what is required regarding the victim's fear. Slightly more than half of states apply the dual standard of "reasonable person" and "actual" fear recommended by the 1993 model anti-stalking code to some or all of the conduct covered by their stalking laws.[32] For example, under Indiana's stalking statute, ""stalk' means a knowing or an intentional course of conduct involving repeated or continuing harassment of another person that would cause a reasonable person to feel terrorized, frightened, intimidated, or threatened ['reasonable person' standard of fear] and that actually causes the victim to feel terrorized, frightened, intimidated, or threatened ['actual' standard of fear]."[33] In states like Indiana, prosecutors have to prove not only that the perpetrator's acts would cause a reasonable person to be fearful but also that he or she succeeded in causing the victim of the crime to actually feel afraid.

Currently, at least fourteen states impose the "reasonable person" standard of fear in their stalking laws[34] while at least five states require the subjec-

32 *See*, for example, Ariz. Rev. Stat. § 13-2923 (2005); Idaho Code § 18-7906 (2005); Ind. Code Ann. § 35-45-10-1 (Michie 2005); Iowa Code § 708.11 (2005); Kan. Stat. Ann. § 21-3438 (2005); Ky. Rev. Stat. § 508.150 (Michie 2005); Me. Rev. Stat. Ann. tit. 17-A § 210-A (West 2005); Mass. Gen. Laws Ann. ch. 265, § 43 (West 2005); Or. Rev. Stat. § 163.732 (2005); Wis. Stat. Ann. § 940.32 (West 2005); and Wyo. Stat. Ann. § 6-2-506 (Michie 2005).

33 Ind. Code Ann. § 35-45-10-1 (Michie 2005).

34 *See*, for example, Ala. Code § 13A-6-90 (2005); La. Rev. Stat. Ann. § 14:40.2; Md. Code Ann., Crim. Law § 3-802 (2005); N.J. Stat. Ann. § 2C:12-10 (West 2005); N.M. Stat. Ann. § 30-3A-3 (Michie

tive "actual fear" standard—that the perpetrator caused the victim to suffer actual fear.[35]

The Model Stalking Code Advisory Board considered two main factors when determining the model stalking code's standard of fear: (1) the impact the standard would have on the victim; and (2) the importance of context in relation to the stalking conduct.

(1) Impact on the Victim. The updated model stalking code drafters rejected the subjective "actual fear" standard because it places an unnecessary burden on prosecutors and victims, requiring prosecutors to prove that the victim actually was in fear and forcing the victim to have to justify his or her fear in the presence of the perpetrator. While many stalking victims do, in fact, experience fear, it should not be necessary to expose them to the added trauma of proving their fear. The problem with stalking laws that impose the "actual fear" standard is articulated in the following law review excerpt:

> The result of such statutes is that stalking victims must take the stand and painfully testify before the court and before the defendant to their state of fear and/or how emotionally disturbed they have become [as a result of the defendant's conduct].... Ironically,...while states have created a stalking offense to punish those who invade the privacy of others, a victim must relinquish that privacy in order to secure a conviction. While stalking statutes were passed to protect the physical safety and lives of victims, a victim must testify to her fear and emotional distress before she will be capable of securing such safety. While stalking statutes provide the victim with the ability to control her life by working within the criminal system to remove a dangerous offender from her life, she gains such control only by testifying to her helplessness in the face of the defendant.[36]

In addition, an "actual fear" standard inappropriately punishes only those stalkers who have "successfully" caused the victim fear, rather than holding all stalkers accountable for committing acts that would cause a reasonable person to feel fear.

2005); R.I. Gen. Laws §§ 11-59-1 and 11-59-2 (2005); Va. Code Ann. § 18.2-60.3 (Michie 2005); and W.Va. Code § 61-2-9a (2005).

35 *See*, for example, Alaska Stat. § 11.41.270 (Michie 2005); Minn. Stat. Ann. § 609.749 (West 2005); Mont. Code Ann. § 45-5-220 (2005); Neb. Rev. Stat. §§ 28-311.02 and 28-311.03 (2005); and Ohio Rev. Code Ann. § 2903.211 (West 2005).

36 Carol E. Jordan et al., "Stalking: Cultural, Clinical and Legal Considerations," *Brandeis Law J* 38, number 3 (2000): 513, 574.

The model stalking code follows the lead of states with stalking laws that provide for the solely objective "reasonable person" standard of fear—that the stalker's conduct would place a reasonable person in fear.[37]

> "Solely objective" means that the focus is not on the particular victim and a particular emotional distress she suffers, but rather, is solely on the defendant: his intent and how his conduct would affect a "reasonable" person. In this group of statutes, any requirement that the defendant's conduct actually result in the victim experiencing heightened fear or substantial emotional distress is completely absent.... In these states, the stalking statutes do not subject the victim to such minute scrutiny, nor require that the prosecution demonstrate the severe distress in which the defendant has succeeded in placing her. Rather, these statutes adhere more to the structure of other criminal statutes—one not particularly targeted for female victims—such as robbery, for example, where all the prosecution must show is that the defendant committed the prohibited act with the designated intent. Notably, such prosecutions fail to require that the state demonstrate that the victim was reduced to hysterics from the criminal actions of the defendant.[38]

(2) Context Surrounding the Stalking Conduct. In recommending the objective "reasonable person" standard of fear, the advisory board also determined that it was important to consider the context surrounding the stalking conduct. Because stalkers often target their former intimate partners, stalking laws must capture the context of the stalker's behavior when evaluating its impact on the victim in order to be effective. For example, if a stalker sends a dozen roses, this gesture may seem benign and loving to the casual observer. However, if that same victim has been told by her stalker numerous times that the day she receives a dozen roses is the day he is going to kill her, those same roses, understood in the context of the victim's experience, mean a very different thing. Those roses may be viewed as a direct threat to kill the victim. Advisory board members viewed it as critical for practitioners to consider the context of a stalker's behavior in every stalking case. Thus, the model stalking code defines "reasonable person" to mean "a reasonable person in the victim's circumstances."

37 *See*, for example, note 36.

38 Jordan, "Stalking: Cultural, Clinical, and Legal Considerations," 556–57.

Fear Element—Level of Fear

The updated "Model Stalking Code for the States" recommends two statutory prongs that establish the level of fear required to constitute stalking: (1) that a reasonable person would fear for his or her safety or the safety of a third person; or (2) that a reasonable person would suffer other emotional distress.

The 1993 model anti-stalking code encouraged states to require a high level of fear—fear of bodily injury or death. While a number of states have followed the 1993 model anti-stalking code's lead and incorporated this high level of fear into their stalking laws,[39] many other states have reduced the level of fear required in their stalking statutes in an attempt to provide earlier and better protection for stalking victims.

Some states require the victim to feel "terrorized, frightened, intimidated, or threatened"[40] or to fear "that the stalker intends to injure the person, another person, or property of the person or of another person."[41] Some states do not specify the consequences that the victim must fear, opting for a more generalized fear, requiring the victim to fear for his or her "safety."[42] In addition to the required element of fear, a number of states' stalking laws include conduct that would cause a reasonable person to suffer some form of mental or emotional distress, or require that the victim actually suffer such distress.[43] Some of these states refer to conduct that seriously "alarms," "annoys," "torments," or "ter-

39 *See*, for example, Alaska Stat. § 11.41.270 (Michie 2005); D.C. Code Ann. § 22-404 (2005); Ky. Rev. Stat. Ann. § 508.150 (Michie 2005); Md. Code Ann., Crim. Law § 3-802 (2005); N.J. Stat. Ann. § 2C:12-10 (West 2005); and W.Va. Code § 61-2-9a (2005).

40 *See*, for example, Mich. Comp. Laws § 750.411h (2005); Minn. Stat. Ann. § 609.749 (West 2005); Neb. Rev. Stat. § 28-311.03 (2005); Nev. Rev. Stat. Ann. § 200.575 (Michie 2005); N.D. Cent. Code § 12.1-17-07.1 (2005); Okla. Stat. Ann. tit. 21, § 1173 (West 2005); and Tenn. Code Ann. § 39-17-315 (2005).

41 *See*, for example, Del. Code Ann. tit. 11, § 1312A (2005); 720 Ill. Comp. Stat. 5/12-7.3 (West 2005); N.Y. Penal Law § 120.45 (Consol. 2005); and R.I. Gen. Laws § 11-59-2 (2005); and Wash. Rev. Code Ann. § 9A.46.110 (2005).

42 *See*, for example, Ariz. Rev. Stat. § 13-2923 (2005); Cal. Penal Code § 646.9 (Deering 2005); Colo. Rev. Stat. § 18-9-111 (2005); Conn. Gen. Stat. § 53a-181d (2005); Fla. Stat. Ann. § 784.048 (West 2005)(in definition of "credible threat"); Ga. Code Ann. § 16-5-90 (2005); Kan. Stat. Ann. § 21-3438 (2005); Mo. Rev. Stat. § 565.225 (2005)(in definition of "credible threat"); N.H. Rev. Stat. Ann. § 633:3-a (2005); N.M. Stat. Ann. § 30-3A-3 (Michie 2005); N.C. Gen. Stat. § 14-277.3 (2005); Or. Rev. Stat. § 163.732 (2005); and Vt. Stat. Ann. tit. 13, § 1061 (2005).

43 *See*, for example, Colo. Rev. Stat. Ann. § 18-9-111 (West 2005); La. Rev. Stat. Ann. § 14:40.2 (West 2005); N.C. Gen. Stat. § 14-277.3 (2005); Utah Code Ann. § 76-5-106.5 (2005); and Vt. Stat. Ann. tit. 13, § 1061 (2005).

rorizes" the victim and require that the conduct result in substantial emotional distress.[44]

The advisory board carefully considered what level of fear would allow the criminal justice system to address the greatest number of stalking cases without exposing innocent persons to potential criminal charges. Based on their observations, the updated model stalking code incorporates a statutory provision that combines elements from existing state laws and recommends the inclusion of two statutory prongs: (1) that a reasonable person would fear for his or her safety or the safety of a third person; or (2) that a reasonable person would suffer other emotional distress. The "reasonable person" standard provides a protective mechanism to ensure that an overly sensitive neighbor, for example, could not successfully lodge a false stalking complaint against an individual who walks by his or her house every day.

(1) Fear for Safety. The seriousness of stalking behavior often escalates over time. The updated "Model Stalking Code for the States" recommends a general fear requirement that would address conduct that may lead to more violent acts in the future. The model stalking code incorporates the "fear for safety" standard adopted in at least 13 states[45] instead of the more stringent standard of fear recommended by the 1993 model anti-stalking code—the fear of bodily injury or death. While the stalking conduct needs to address behavior that goes beyond merely annoying the victim, requiring the victim to fear bodily injury or death creates a situation that may impede timely intervention by the criminal justice system. Intervention and victim assistance before stalking conduct has escalated to this level is critical. Courts have also upheld the use of the term "safety," finding that it is neither unconstitutionally vague or overbroad. A California court recognized that the term "has a commonly understood meaning which gives adequate notice of the conduct proscribed."[46]

In addition, because stalking behavior is as varied as the people who commit the crime, a stalking victim may not be able to predict what the stalker will do next. Fear of the unknown can be just as strong as the fear of death or

44 Kan. Stat. Ann. § 21-3438 (2005). *See also* Idaho Code § 18-7906 (Michie 2005); Ky. Rev. Stat. Ann. § 508.130 (Michie 2005).

45 *See*, for example, note 44.

46 *In re* Joseph G., 7 Cal. App. 3d 695, 703 (1970).

serious physical harm. Fear of other consequences may also be equally traumatizing to a victim, depending on the circumstances surrounding the stalking. Many victims fear that they will be sexually assaulted by the individual who is stalking them. A mother who feels that her child is in danger due to a stalker's behavior might be more fearful that the child will be kidnapped or harmed than concerned about her own personal safety. The "fear for safety" language helps ensure that any of these fears would be covered under a state's stalking law.

(2) Other Emotional Distress. In addition to conduct that would cause a reasonable person to fear for his or her safety or the safety of a third person, the model stalking code recommends that conduct that would cause a reasonable person to suffer other emotional distress, defined as "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling," be addressed in state stalking laws.

The advisory board recognized that certain types of stalking behavior committed as part of a course of conduct, such as making repeated telephone calls to a victim at a workplace, possibly endangering her job, or engaging in conduct that destroys the victim's credit history, depending on the context, might not meet the "fear for safety" standard. By incorporating "other emotional distress," the model stalking code enables states to prosecute such acts under their stalking laws.

While the 1993 model anti-stalking code did not include an "emotional distress" prong, the inclusion of "emotional distress" is well supported in state stalking statutes and related case law. Roughly half of states incorporate terms equivalent to "emotional distress" somewhere in their stalking laws,[47] primarily in the definition of "course of conduct,"[48] "harassment,"[49] or the offense itself.[50]

47 *See*, for example, ALA. CODE § 13A-6-92 (2005) ("mental anxiety"); and W.VA. CODE § 61-2-9a (2005) ("mental injury").

48 *See*, for example, KAN. STAT. ANN. § 21-3438 (2005) and MISS. CODE ANN. § 97-3-107 (2005).

49 *See*, for example, FLA. STAT. ANN. § 784.048 (West 2005); GA. CODE ANN. § 16-5-90 (2005); MICH. COMP. LAWS ANN. § 750.411h (West 2005); MO. REV. STAT. § 565.225 (2005); R.I. GEN. LAWS § 11-59-1 (2005); and WYO. STAT. ANN. § 6-2-506 (Michie 2005).

50 *See*, for example, D.C. CODE ANN. § 22-404 (2005); LA. REV. STAT. ANN. § 14:40.2 (West 2005); MONT. CODE ANN. § 45-5-220 (2005); 18 PA. CONS. STAT. ANN. § 2709.1 (West 2005); and UTAH CODE ANN. § 76-5-106.5 (2005).

In the case of *State v. Culmo*, the court acknowledged the mental impact that stalking has on a victim's ability to enjoy his or her daily life, noting that:

> [The] state's interest in criminalizing stalking behavior . . . is compelling. . . . Providing protection from stalking conduct is at the heart of the state's social contract with its citizens, who should be able to go about their daily business free of the concern that they may be the targets of systematic surveillance by predators who wish them ill. The freedom to go about one's daily business is hollow, indeed, if one's peace of mind is being destroyed, and safety endangered, by the threatening presence of an unwanted pursuer.[51]

The model stalking code includes the alternative statutory prong that allows states to hold stalkers accountable if their behavior would cause a reasonable person to suffer other emotional distress.

Lack of Threat Requirement

As with the 1993 *Model Anti-Stalking Code for the States,* the updated model stalking code does not include a threat requirement. Although a few state stalking laws retain a "credible threat" requirement, many others have eliminated such a requirement. The model stalking code adopts this approach because stalkers often do not make any threats at all or make veiled threats in seemingly innocent language. Further, what might be threatening in one cultural frame of reference could appear harmless in another environment.

Threats can vary greatly and often are symbolic or contain references that only the victim understands. For example, if a victim is attempting to hide from a stalker and moves into a new apartment, then finds a single yellow rose on her doorstep—the same gesture the stalker has made to her each time he assaulted her in the past—she is likely to view the rose as a signal that she has been found and that she is in danger. On the other hand, someone who does not know the history between the parties may view the rose as a lovely gesture. As a result, including a threat requirement in statutory language may limit the cases that can be successfully prosecuted. Instead, the model stalking code includes the term "threatens" as one possible action a stalker may commit in a "course of conduct," but does not require an offender to make a threat to meet the statutory definition of stalking.

51 *State v. Culmo*, 642 A.2d 90, 101–102 (Conn. Super. Ct. 1993).

Inclusion of "Third Person" as a Target of Stalker's Acts

The updated "Model Stalking Code for the States" recommends a standard of "fear for the safety of a third person" in addition to fear for the victim's own safety.

The 1993 model anti-stalking code recommended that conduct directed toward the victim's immediate family that elicited the requisite level of fear should be covered by a state's stalking law. (See Appendix A for the1993 *Model Anti-Stalking Code for the States*.) The definition of "immediate family" was limited to the traditional nuclear family members or "any other person who regularly resides in the household or who within the prior six months regularly resided in the household."[52] In the commentary accompanying the 1993 model anti-stalking code, its drafters cautioned states that expanding the definition of "immediate family" too much might subject their stalking laws to challenges that they are overly broad,[53] a concern which has proven to be generally unfounded.

Most state stalking laws follow the 1993 model anti-stalking code and require the victim to fear that she or he is in danger or that an immediate family member is in danger. However, a number of states extend the application of their stalking statutes to include a victim's fear for his or her friends, companions, or neighbors, or to anyone the victim knows. For example, in Colorado, stalking conduct directed at "someone with whom [the victim] has or has had a continuing relationship" which causes the victim to fear for that person is covered.[54] In addition to immediate family, West Virginia's stalking law extends to "a person with whom [the victim] has or in the past has had or with whom he or she seeks to establish a personal or social relationship, whether or not the intention is reciprocated,…[the victim's] current social companion, [or the victim's] professional counselor or attorney."[55] Louisiana's stalking law applies if a reasonable person would feel alarmed or suffer emotional distress as a result

52 National Institute of Justice, "Project to Develop a Model Anti-Stalking Code for States," (Washington, DC: National Institute of Justice, Office of Justice Programs, U.S. Department of Justice, 1993), 43.

53 Ibid., 45.

54 Colo. Rev. Stat. § 18-9-111 (2005).

55 W.Va. Code § 61-2-9a (2005).

of verbal or behaviorally implied threats of criminal acts toward "any person with whom [the victim] is acquainted."[56]

A few states are even more inclusive. Delaware and Maryland use the catchall "third person," while the Washington stalking law covers cases in which the victim is placed in fear of injury to "another person" or the property of "another person." To date, no state law that recommends a standard of fear for the safety of a third person, in addition to fear for the victim's own safety, has been challenged as being overbroad.

The model stalking code recommends the standard of "fear for the victim's safety or for the safety of a third person," for several reasons. First, most stalking takes place in the context of domestic violence. When stalkers know their victims well, they usually know the individuals who are important to the victim. Whether it is the victim's parent, child, employer, or new intimate partner, a stalker may deliberately target those close to the victim to further terrorize the victim. Second, if the victim lives in a particular immigrant, religious, or cultural community, the stalker may target those persons who provide support to the victim, even if they are not the victim's family members.

By encouraging states to expand the scope of their stalking laws to include the victim's fear for the safety of other people, the model stalking code seeks to ensure that stalkers who prey on the victim's fears for the safety of a third person do not elude prosecution.

SECTION THREE: DEFINITIONS

As used in this Model Statute:

(a) "Course of conduct" means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.

56 La. Rev. Stat. Ann. § 14:40.2 (West 2005). See also N.Y. Penal Law § 120.45 (Consol. 2005) ("a third party with whom such person is acquainted"); and N.C. Gen. Stat. §14-277.3 (2005) ("close personal associates").

(b) "Emotional distress" means significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling;

(c) "Reasonable person" means a reasonable person in the victim's circumstances.

Analysis and Commentary

1. *"Course of Conduct"*

State stalking laws typically require the stalker to engage in a "course of conduct" directed at a specific person or require that he or she act "repeatedly." Generally, definitions for "course of conduct" include the number of acts required and the type of acts prohibited. With the emergence of ever advancing technology, states must also consider whether their stalking laws cover conduct that is accomplished through the use of current and possible future technological innovations.

Number of Acts Required. The updated "Model Stalking Code for the States" recommends that a "course of conduct" be defined as "two or more acts" of the requisite behavior.

Under the 1993 model anti-stalking code, a stalker was required to commit the specified acts "repeatedly" to establish a "course of conduct."[57] "Repeatedly" was defined as "on two or more occasions."[58]

In a number of states, two or more separate acts are necessary to constitute a "course of conduct,"[59] or the acts in question must be committed on

57 National Institute of Justice, "Project to Develop a Model Anti-Stalking Code for States," 43.

58 Ibid.

59 *See*, for example, Cal. Penal Code § 646.9(f) (West 2005); Ky. Rev. Stat. Ann. § 508.130(2) (Michie 2005); N.H. Rev. Sat. Ann. § 633:3-a (II)(a) (2005); Okla. Stat. Ann. tit. 21, § 1173(F)(2) (2005); and Tenn. Code Ann. § 39-17-315(a)(1) (2005).

two or more occasions to meet the definition of "repeatedly."[60] Some of these states require that the acts occur within a certain period of time. Arkansas requires "two or more acts separated by at least 36 hours, but occurring within one year" to establish a "course of conduct."[61] Minnesota defines a "pattern of harassing conduct" as "two or more acts within a five-year period."[62] Colorado, New Mexico, North Carolina, Texas, and Virginia require acts that are committed on "more than one occasion."[63] Pennsylvania defines "course of conduct" as "a pattern of actions composed of more than one act."[64]

In many of the remaining states, a "course of conduct" is a "series of acts over a period of time" with no minimum number of acts specified,[65] or the perpetrator must "repeatedly" commit the specified acts and the term "repeatedly" is not defined.

Like the 1993 *Model Anti-Stalking Code for the States* and many of the states' stalking laws, the updated model stalking code urges that two acts with no time restrictions between the acts be sufficient to establish a "course of conduct" to allow for the earliest possible intervention by the criminal justice system.

Inclusion of a List of Prohibited Acts. The model stalking code recommends that the definition of "course of conduct" include some guidance to state courts regarding the breadth of acts the statute was designed to address, without including an exclusive list of specific examples.

The 1993 model anti-stalking code intentionally chose not to "list specific types of actions that could be construed as stalking [because] some courts had ruled that if a statute includes a specific list, the list is exclusive."[66] However,

60 *See*, for example, Iowa Code § 708.11(1)(d) (2005); Me. Rev. Stat. Ann. tit. 17-A, § 210-A(2)(C) (West 2005); and N.J. Stat. Ann. § 2C:12-10(1)(a)(2) (West 2005).

61 Ark. Code Ann. § 5-71-229 (Michie 2005).

62 Minn. Stat. Ann. § 609.749 (West 2005).

63 Colo. Rev. Stat. Ann. § 18-9-111(4)(c)(IV) (2005); N.M. Stat. Ann. § 30-3A-3(A) (Michie 2005); N.C. Gen. Stat. § 14-277.3(a) (2005); Tex. Penal Code Ann. § 42.072(a) (West 2005); and Va. Code Ann. § 18.2-60.3(A) (Michie 2005).

64 18 Pa. Cons. Stat. Ann. § 2709.1(f) (West 2005).

65 *See*, for example Alaska Stat. § 11.41.270(b)(1) (Michie 2005); R.I. Gen. Laws § 11-59-1(1) (2005); S.D. Codified Laws § 22-19A-5 (Michie 2005); and Wyo. Stat. Ann. § 6-2-506(a)(i) (Michie 2005).

66 National Institute of Justice, "Project to Develop a Model Anti-Stalking Code for States," 44.

the definition of "course of conduct" in the 1993 anti-stalking model code is somewhat limiting, requiring the perpetrator to maintain a visual or physical proximity to the victim, convey explicit or implicit threats, or engage in a combination of those two behaviors.

State stalking laws vary in terms of whether they provide a list of specific examples of prohibited behavior, generally phrased as conduct that "includes, but is not limited to . . . [list of acts]."[67] This type of statutory language can provide prosecutors and courts with guidance as to the types of behavior that legislatures intended to sanction. It also educates criminal justice system practitioners about the nature of stalking. Despite these advantages, such lists can never be all-inclusive and may lead law enforcement to disregard stalking behaviors that are not included on the list or provide courts with a basis for interpreting those provisions as limited to the conduct listed.

The advisory board considered whether the benefits of identifying specific examples of acts that could constitute a "course of conduct" were outweighed by the potential misuse of such a list. Board members concluded that the definition of "course of conduct" should include some guidance to state courts regarding the breadth of acts the statute was designed to address, without including an exclusive list of specific examples. Toward that end, the definition of "course of conduct" highlights general categories of acts accomplished in any manner possible by using the following language: "such acts include, but are not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property."

67 For example, Wisconsin's statute includes the following acts in its definition of "course of conduct": maintaining visual or physical proximity to the victim; approaching or confronting the victim; appearing at the victim's workplace or contacting the victim's employer or coworkers; appearing at the victim's home or contacting the victim's neighbors; entering property owned, leased, or occupied by the victim; contacting the victim by telephone or causing the victim's telephone or any other person's telephone to ring repeatedly, regardless of whether a conversation ensues; photographing, videotaping, audiotaping, or, through any other electronic means, monitoring or recording the activities of the victim; sending material by any means to the victim or for the purpose of obtaining or disseminating information about, or communicating with, the victim to a member of the victim's family or household or an employer, coworker, or friend of the victim; placing an object on or delivering an object to property owned, leased, or occupied by such a person with the intent that the object be delivered to the victim; causing someone else to engage in any of these acts. Wis. Stat. § 940.32(1)(a) (2005).

The language used is intended to cover the wide range of methods currently used to commit stalking, such as acts perpetrated by mail, telephonic or telecommunications devices, electronic mail, Internet communications or postings, global positioning systems, hidden video cameras, harassing litigation, and facsimile, as well as unanticipated future methods of stalking. It is also designed to cover stalking tactics in which stalkers indirectly harass victims through thirdparties. For example, stalkers have posted messages on the Internet suggesting that victims like to be raped and listing the victims' addresses, thereby inciting third parties to take action against victims.[68] The statute does not provide a list of more specific examples since such a list could quickly become outdated.

Coverage of Emerging Forms of Technology or Surveillance. The updated model stalking code sets forth a definition of "course of conduct" intended to encompass stalking behavior that is accomplished by or through the use of "any action, method, device, or means" in order to include current and future technology or surveillance methods that stalkers may use to monitor, track, or terrorize victims in the future.

As with the 1993 model anti-stalking code, which requires a stalker to "maintain a visual or physical proximity," some state stalking laws do not set forth clearly whether certain types of surveillance are prohibited, and also require a stalker's "visual or physical presence" for surveillance to be considered an act of stalking.[69] Increasingly, however, stalkers are using new technologies such as tiny hidden cameras, global positioning systems, and computer spyware programs to track victims. These actions may or may not be considered "visual

68 A few states have addressed the use of technology by stalkers who post personal information about their victims on-line that encourages others to contact them for illicit purposes. Michigan created a separate offense to specifically prohibit a person from posting "a message through the use of any medium of communication, including the Internet or a computer, computer program, computer system, or computer network, or other electronic medium of communication, without the victim's consent," if certain conditions apply. Mich. Comp. Laws § 750.411s (2005).

Nevada's stalking law covers this type of conduct by stating that a person commits the crime of stalking when he or she uses "an Internet or network site or electronic mail or any other similar means of communication to *publish, display or distribute information in a manner that substantially increases the risk of harm or violence to the victim*." Nev. Rev. Stat. Ann. § 200.575(3) (Michie 2005) (emphasis added).

69 S*ee*, for example, N.J. Stat. Ann. §2C:12-10 (West 2005) and Utah Code Ann. § 76-5-106.5 (2005).

or physical presence" under existing laws, making the laws vulnerable to judicial scrutiny and interpretation.

Therefore, the updated model stalking code recommends a more general definition of "course of conduct" to capture stalking behavior accomplished through currently available means and future technologies and to provide law enforcement, prosecutors, and courts wider latitude when applying the law.

2. *"Emotional Distress"*

The updated "Model Stalking Code for the States" recommends that "emotional distress" be defined as "significant mental suffering or distress that may, but does not necessarily, require medical or other professional treatment or counseling." As previously discussed in Section Two of "Commentary to the Code," the model stalking code includes the term "other emotional distress" in one statutory prong of the offense. This language conveys a level of suffering that is significant but that does not necessarily rise to the level of psychological trauma requiring medical intervention or proof of any type of long-term ill effects. A number of courts have held that independent expert testimony is not necessary to prove "emotional distress."[70]

The 1993 model anti-stalking code recommended a high level of fear—the fear of serious injury or death. Therefore, a definition of emotional distress was not included.

While roughly half of states include the term "emotional distress" or something similar in their stalking laws,[71] only a few provide a definition for the term. For example, in Pennsylvania, "emotional distress" is "a temporary or permanent state of mental anguish."[72] Both Michigan's and Oklahoma's stalking laws define "emotional distress" as "significant mental suffering or distress, that may, but does not necessarily require, medical or other professional treatment or counseling."[73] The drafters of the updated model stalking code chose

70 *Delaware v. Knight*, 1994 Del Super. LEXIS 2 (Del. Sup. Ct. 1994); *Ohio v. Tichon*, 658 N.E.2d. 16 (Oh. Ct. App. 1995).

71 For additional discussion of the concept of emotional distress, please refer back to Section Two of "Commentary to the Code," page 40.

72 18 Pa. Cons. Stat. Ann. § 2709.1(f) (West 2005).

73 Okla. Stat. Ann. tit. 21, § 1173(F)(3) (West 2005) and Mich. Comp. Laws Ann. § 750.411h(1)(b) (West 2005).

to borrow the language used by Michigan and Oklahoma to define "emotional distress."

Relevant case law supports the use of this definition. For example, the Missouri Court of Appeals, in *Wallace v. Van Pelt*,...compared the use of the term "emotional distress" in criminal stalking statutes to the use of the term in intentional infliction of emotional distress tort claims. The Missouri court recognized that "emotional distress" was previously defined in the Restatement (Second) of Torts § 46, as including "all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea."[74]

The term "emotional distress" is intended to cover a reasonable person's reaction to many stalking behaviors, such as ongoing harassing telephone calls or being placed under constant surveillance.

3. *"Reasonable Person"*

The updated "Model Stalking Code for the States" recommends that "reasonable person" be defined as a "reasonable person in the victim's circumstances."

The 1993 model anti-stalking code also recommended a "reasonable person" standard of fear but did not provide a definition for the term.

Several states' definitions of a "reasonable person" are similar to the recommended definition of a "reasonable person in the victim's circumstances." For example, Oregon provides that the crime of stalking is committed if "it is objectively reasonable for a person in the victim's situation to have been alarmed or coerced by the contact."[75] South Carolina's stalking statute proscribes criminal behavior that would cause "a reasonable person in the targeted person's position to be in fear."[76]

Furthermore, several courts have discussed the significance of considering the victim's circumstances when determining whether a reasonable person would have been afraid. For example, in *State v. Breen*,[77] the Supreme Court of

74 *Wallace v. Van Pelt*, 969 S.W.2d 380 (Mo. Ct. App. 1998) at 386, citing Restatement (Second) of Torts § 46, cmt. j (1965).

75 Or. Rev. Stat. § 163.732 (2005).

76 S.C. Code Ann. § 16-3-1700 (Law. Co-op 2005).

77 *State v. Breen*, 767 A.2d 50 (R.I. 2001).

Rhode Island affirmed a defendant's stalking conviction, using the evidence of a prior stalking conviction with the same victim as justification for the victim suffering substantial emotional distress, despite the fact that the defendant had only left letters of poetry on the victim's windshield and mailed a few non-threatening cards to her house. The court reasoned that the defendant's behavior met the definition of harassment in the state's stalking statute because the defendant initiated these communications on the exact date that his probation ended for a prior conviction for stalking of the same victim. The court determined that, "Given the history of the relationship between defendant and complainant, we agree that the new series of specific instances of conduct by defendant and the impact they had on complainant constituted sufficient evidence for the jury to find the elements of harassment beyond a reasonable doubt under [Rhode Island's stalking statute]."[78]

Similarly, the Supreme Court of New Jersey noted that "the reasonable standard refers to persons in the victim's position and with the victim's knowledge of the defendant. 'Courts must…consider [the victim's] individual circumstances and background in determining whether a reasonable person in that situation would have believed the defendant's threat.'"[79]

The updated model stalking code adopts the standard of requiring that the behavior cause a reasonable person to feel fear, rather than requiring a state to prove the particular victim actually felt fearful.[80] It further defines a "reasonable person" to mean "a reasonable person in the victim's circumstances."[81] Including "in the victim's circumstances" underscores the importance of context when evaluating a stalking case, as was discussed more thoroughly earlier in the commentary (page 37).

78 Ibid., 56.

79 *H.E.S. v. J.C.S.*, 815 A.2d 405, 417 (N.J. 2003) quoting from *Cesare v. Cesare*, 713 A.2d 390 (N.J. 1998).

80 For additional discussion of the concept of reasonable fear, please refer back to Section Two under "Commentary to the Code," page 34.

81 Ibid.

SECTION FOUR: DEFENSES

In any prosecution under this law, it shall not be a defense that:

(a) the actor was not given actual notice that the course of conduct was unwanted; or
(b) the actor did not intend to cause the victim fear or other emotional distress.

Analysis and Commentary

Defenses

The updated "Model Stalking Code for the States" recommends that state stalking laws specifically exempt two typical defenses claimed by stalkers: (1) that the perpetrator was not given actual notice by the victim that his or her conduct was not wanted; or (2) that the stalker did not intend to cause the victim fear or other emotional distress.

While the 1993 model anti-stalking code did not address the issue of defenses such as these, several states have chosen to do so. North Dakota's stalking statute provides that "it is not a defense that the actor was not given actual notice that the person did not want the actor to contact or follow the person; nor is it a defense that the actor did not intend to frighten, intimidate, or harass the person."[82] Similar language is used in Washington's stalking law.[83] In these and other states, evidence that the defendant continued to engage in the course of conduct after being asked to stop by the victim creates a rebuttable presumption that the continuation of the course of conduct caused the victim to feel frightened, intimidated, or harassed.[84]

82 N.D. Cent. Code § 12.1-17-07.1(3) (2005).

83 Wash. Rev. Code Ann. § 9A.46.110(2)(a) and (b) (West 2005).

84 *See,* for example, Mich. Comp. Laws Ann. § 750.411h(4) (West 2005); Mont. Code Ann. § 45-5-220(6) (2005); and Tenn. Code Ann. § 39-17-315(f) (2005).

The model stalking code includes a statutory provision that makes these same two defenses unavailable to perpetrators charged with stalking crimes. Often, a stalker will claim that he did not know that the victim did not want him to engage in certain behaviors, or that he did not intend to cause the victim fear. In cases where the stalker suffers under the delusion that the victim is actually in love with him or her or that, if properly pursued, the victim will fall in love with him, he or she may not intend to cause the victim fear, but instead intends to form a relationship with the victim. It can be difficult for prosecutors to overcome such claims—even when they are untrue. By specifically prohibiting defendants from asserting such defenses, the updated model stalking code relieves prosecutors of the burden of refuting such claims.

The model stalking code's adoption of a general intent requirement makes it irrelevant that a stalker did not intend to cause the victim fear or other emotional distress. Specifically prohibiting a stalker from asserting a claim that he did not intend to cause such a reaction as a defense to the crime supports the model stalking code's intention to make stalking a general intent crime.

The model stalking code also does not require victims to give stalkers actual notice that the course of conduct is unwanted. Stalkers can be unreasonable and unpredictable. Recommending that a victim confront or try to reason with the individual who is stalking him or her can be dangerous and may unnecessarily increase the victim's risk of harm. Instead, the updated model stalking code places the responsibility on stalkers not to engage in behaviors that would cause a reasonable person to fear for his or her safety or to suffer other emotional distress.

Lack of Exemptions. A number of states include exemptions or affirmative defenses to stalking crimes for certain categories of persons, such as law enforcement officers, private investigators, or process servers.[85] Where these exceptions are not narrowly drawn, they raise the possibility that a stalker who happens to be employed in one of these professions or who uses one of these persons as an agent to conduct stalking could evade prosecution. There are many cases, for example, in which stalkers have hired private investigators to

85 *See*, for example, Ark. Code Ann. § 5-71-229(c) (Michie 2005); Del. Code Ann. tit. 11, § 1312A(d) (2005); Nev. Rev. Stat. Ann. § 200.575(e) (Michie 2005); Va. Code Ann. § 18.2-60.3(A) (Michie 2005); and Wash. Rev. Code Ann. § 9A.46.110 (West 2005).

track down victims. The advisory board felt strongly that these stalkers should be held accountable under the law.

Other state laws create exceptions for stalking in certain locations, such as the defendant's own home.[86] This type of language could exempt many domestic offenders from prosecution. As a result, the model stalking code does not include any exemptions or affirmative defenses for such persons or situations.

Some state stalking laws also include an exemption in their statutes for "constitutionally protected behavior,"[87] such as labor picketing or political demonstrations. This language was purposefully excluded from the model stalking code because the advisory board felt that such behavior is already covered by the Constitution and would not be criminalized under state stalking statutes.

OPTIONAL PROVISIONS

Acknowledging that states vary greatly in their approach to classifying crimes, the advisory board offers the following optional provisions to give states added perspective as they review their stalking laws.

SECTION FIVE: CLASSIFICATION

Stalking is a felony.

Aggravating factors.

The following aggravating factors shall increase the penalty for stalking:

(a) the defendant violated a protective order prohibiting contact with the victim; or

(b) the defendant was convicted of stalking any person within the previous 10 years; or

86 *See*, for example, Ga. Code Ann. § 16-5-90(a)(1) (2005); 720 Ill. Comp. Stat. 5/12-7.3(d) (West 2005); and Wyo. Stat. Ann. § 6-2-506(b)(ii) (Michie 2005).

87 *See*, for example, Ark. Code Ann. § 5-71-229(d)(1)(B)(i) (West 2005); Cal. Penal Code § 646.9(g) (West 2005); Idaho Code § 18-7906(2)(a) (2005); and Nev. Rev. Stat. Ann. § 200.575(e)(1) (Michie 2005).

(c) the defendant used force or a weapon or threatened to use force or a weapon; or
(d) the victim is a minor.

Analysis and Commentary

Classification

As with the 1993 model anti-stalking code, the updated "Model Stalking Code for States" recommends that states classify stalking as a felony. Such a classification communicates to the public that stalking is dangerous and will be taken seriously, and it assists criminal justice system professionals in holding stalkers accountable for their crimes. The longer terms of confinement generally available when a crime is classified as a felony may offer more protection for stalking victims.

Recognizing the danger of stalking, many state laws already have begun to classify stalking crimes as felonies. At present, fifteen states can classify stalking as a felony upon the first offense,[88] and thirty-four states classify stalking as a felony upon the second offense[89] and/or when the crime involves aggravating factors.[90] Only Maryland classifies all stalking cases as misdemeanor crimes.[91]

The advisory board concluded that the enactment of felony stalking statutes would enable law enforcement to have a significant impact on a stalker's

88 Alabama, Arizona, Arkansas, California (first offense stalking can be charged as a felony or a misdemeanor at the discretion of the prosecutor), Colorado, Delaware (first offense stalking can be charged as a felony if it induces actual fear in the victim), Illinois, Indiana, Kansas, Massachusetts, New Jersey, Rhode Island, South Carolina, Texas, and Wisconsin.

89 For example, Alaska, Connecticut, Georgia, Hawaii, Idaho, Iowa, Kentucky, Louisiana, Maine, Minnesota, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Texas, Utah, Vermont, Virginia, Washington, West Virginia, and Wisconsin.

90 For example, Alaska, Connecticut, Florida, Georgia, Idaho, Iowa, Kentucky, Louisiana, Michigan, Minnesota, Nevada, New York, Ohio, Oklahoma, Pennsylvania, Tennessee, Utah, Vermont, Washington, Wisconsin, and Wyoming.

91 Md. Code Ann., Crim. Law § 3-802 (2005). Note: Although all stalking offenses in Maryland are classified as misdemeanors, stalkers can be sentenced up to five years.

behavior at an earlier stage and would allow more intensive post-conviction supervision. The model stalking code encourages states to classify stalking as a felony offense because the obsessive, controlling, and persistent nature of stalking presents a serious danger to victims even when other factors—such as weapons—are not involved. Although the model stalking code recommends that states establish one felony stalking offense, in states where this would not be feasible, legislatures may wish to consider creating a two-tier structure. In those states, stalking would become a felony (or higher class felony) for the commission of a second offense or if any other aggravating factors were present. This concept was also presented in the 1993 model anti-stalking code: "If stalking is not treated as a felony [upon a first offense], a state may wish to consider incorporating a system of aggravating factors into its stalking sentencing policy so that a particular stalking incident can be elevated from a misdemeanor to a felony if those aggravating factors are present."[92]

Aggravating Factors

The updated "Model Stalking Code for the States" includes an optional classification structure which incorporates aggravating factors to provide states with more flexibility in sentencing stalkers in a graduated manner which more appropriately reflects the circumstances surrounding the commission of the crime. Even in states that already treat stalking as a felony, certain aggravating circumstances may justify the imposition of enhanced penalties.

While the 1993 model anti-stalking code did not recommend specific language relating to aggravating factors for states to use in their stalking laws, it did encourage states to consider incorporating sentencing enhancements in cases involving aggravating factors, particularly when the perpetrator has committed a previous felony or stalking offense against the same victim, or when he or she has a prior conviction for stalking against a different victim.[93] The rationale behind imposing enhanced penalties in stalking cases that involve repeat offenders is that the potential for receiving a longer sentence may deter some stalkers from stalking again.

92 National Institute of Justice, "Project to Develop a Model Anti-Stalking Code for States," 49.

93 Ibid., 50.

Many states impose enhanced penalties when aggravating factors are involved in the commission of a stalking offense. The aggravating factors listed in Section Five ("Classification") of the "Model Stalking Code for the States" are those most commonly found in state stalking laws. Two-thirds of the states have increased penalties when stalking is committed in violation of a protective order.[94] At least 14 states authorize the imposition of more stringent penalties if a deadly or dangerous weapon was used during the commission of the crime.[95] A vast majority of state stalking laws include a previous conviction for a stalking offense as an aggravating factor,[96] and stalking of a minor is considered a more serious offense in at least 14 states.[97]

Some states include additional aggravating factors that trigger the imposition of enhanced penalties. In Delaware, stalking escalates from a class A misdemeanor to a class F felony if "the actor's conduct induces fear in the victim."[98] A person commits aggravated stalking in Illinois when, in conjunction with committing the offense of stalking, he or she also "causes bodily harm to the victim" or "confines or restrains the victim."[99] Ohio's stalking law includes a list of ten aggravating factors that make the offense a felony, including if: the offender has a history of violence directed toward the victim; the offender caused serious physical harm to the victim's residence or personal property; or the victim was an employee of a public children's services agency and the stalking relates to the employee's performance of official responsibilities or duties.[100]

94 *See*, for example, Ark. Code Ann. § 5-71-229 (Michie 2005); Ga. Code Ann. § 16-5-90 (2005); Ind. Code Ann. § 35-45-10-5 (Michie 2005); and Miss. Code Ann. 97-3-107 (2005).

95 *See*, for example, Iowa Code § 708.11 (2005); Ky. Rev. Stat. Ann. § 508.140 (Michie 2005); Minn. Stat. Ann. § 609.749 (West 2005); Utah Code Ann. § 76-5-106.5 (2005); and Wash. Rev. Code Ann. § 9A.46.110 (West 2005).

96 *See*, for example, Ark. Code Ann. § 5-71-229 (Michie 2005); Ga. Code Ann. § 16-5-90 (2005); Iowa Code § 708.11 (2005); Neb. Rev. Stat. § 28-311.04 (2005); and S.C. Code Ann. § 16-3-1720 (Law. Co-op. 2005).

97 *See*, for example, Alaska Stat. § 11.41.260 (Michie 2005); Conn. Gen. Stat. § 53a-181c (West 2005); Iowa Code § 708.11 (2005); and S.D. Codified Laws § 22-19A-7 (Michie 2005).

98 Del. Code Ann. tit. 11, § 1312A(e) (2005).

99 720 Ill. Comp. Stat. 5/12-7.4 (West 2005).

100 Ohio Rev. Code Ann. § 2903.211 (West 2005).

States also vary in how sentencing enhancements are reflected in their laws. Generally, states create a separate offense of "aggravated stalking,"[101] designate varying degrees of stalking (usually first and second degree),[102] or elevate the classification of the offense, or provide for harsher penalties, directly in the language of their stalking law when aggravating factors are involved.[103]

Following the lead of state stalking laws, the updated model stalking code gives states the option to incorporate a sentencing hierarchy that allows for the imposition of enhanced penalties in stalking cases that involve certain aggravating factors. The four aggravating factors selected for inclusion in this optional provision of the model stalking code were chosen for several reasons. First, they are the aggravating factors most commonly selected by states. Second, stalking involving any of these factors may pose a particularly high level of risk to victims. Finally, two of these factors—violation of a protective order and previous stalking conviction—recognize that stalkers are often recidivists who may not cease their stalking behavior without stern intervention by the criminal justice system.

The model stalking code increases the penalty for stalking when a perpetrator violates a protection order. In such cases, a criminal or civil court already has ordered a stalker to refrain from certain behaviors (e.g., from contacting the victim), and the stalker has disobeyed the court's order. The stalker's blatant disregard of a court order suggests that the stalker may go to any length to control or harm the victim.

Similarly, the model stalking code's second aggravating factor increases the penalty against stalkers who have been previously convicted of stalking. This provision is designed to punish stalkers who are recidivists and seem undeterred by initial criminal justice system intervention.

101 *See*, for example, Ala. Code § 13A-6-91 (2005); Ga. Code Ann. § 16-5-91 (2005); Haw. Rev. Stat. § 711-1106.4 (Michie 2005); 720 Ill. Comp. Stat. 5/12-7.4 (West 2005); N.M. Stat. Ann. § 30-3A-3.1 (Michie 2005); S.C. Code Ann. § 16-3-1730 (Law Co-op. 2005); and Vt. Stat. Ann. tit. 13, § 1063 (2005).

102 *See*, for example, Alaska Stat. §§ 11.41.260 and 270 (Michie 2005); Conn. Gen. Stat. §§ 53a-181c—181e (West 2005); Idaho Code §§ 18-7905 and 7906 (2005); Ky. Rev. Stat. Ann. §§ 508.140 and 150 (Michie 2005); and N.Y. Penal Law §§ 120.45—60 (Consol. 2005).

103 *See*, for example, D.C. Code Ann. § 22-404 (2005); Ind. Code Ann. § 35-45-10-5 (Michie 2005); Iowa Code § 708.11 (2005); Kan. Stat. Ann. § 21-3438 (2005); and La. Rev. Stat. Ann. § 14:40.2 (West 2005).

The model stalking code also increases the penalty for stalking in cases in which the stalker used, or threatened to use, force or a weapon to commit the crime. Like many state stalking laws, the model stalking code acknowledges that where force or weapons are present or threatened, the stalker's level of dangerousness is higher.[104] While all stalking behavior is controlling, a stalker's willingness to use a weapon is a higher indication that he or she is capable of severe violence.[105] Therefore, the model stalking code increases the penalty in stalking cases in which weapons or threats of force are present.

Finally, the model stalking code provides enhanced penalties when stalkers prey on minor victims because they are particularly vulnerable. This provision could be extended to other vulnerable victims such as the elderly or victims who have physical or mental disabilities.

The model stalking code encourages states to consider these aggravating factors and enhanced penalties when developing sentencing provisions relating to their criminal stalking laws.

SECTION SIX: JURISDICTION

As long as one of the acts that is part of the course of conduct was initiated in or had an effect on the victim in this jurisdiction, the defendant may be prosecuted in this jurisdiction.

Analysis and Commentary

Jurisdiction

The updated "Model Stalking Code for the States" recommends that a person who has committed the crime of stalking can be prosecuted in any jurisdiction

104 *See* note 97.

105 Lethality assessments in the domestic violence field often screen for the presence of weapons for this reason. *See also,* Jacquelyn C. Campbell et al., "Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study," *American J. of Pub. Health* 93, number 7 (July 2003), which finds that abusers' previous threats with a weapon and threats to kill were associated with substantially higher risks for femicide and that abusers' access to firearms was strongly associated with intimate partner femicide.

where any of the acts constituting the requisite course of conduct were initiated or had an effect on the victim.

The 1993 model anti-stalking code did not provide any guidance regarding jurisdictional issues. A few states include language relating to the proper jurisdiction for prosecuting a stalking case when acts are committed in multiple states. For example, Pennsylvania's stalking law states that "[a]cts indicating a course of conduct which occur in more than one jurisdiction may be used by any other jurisdiction in which an act occurred as evidence of a continuing pattern of conduct or a course of conduct."[106] The Superior Court of Pennsylvania determined that "criminal jurisdiction is conferred upon Pennsylvania courts if an element of a crime was committed in Pennsylvania" based on the jurisdictional language included in Pennsylvania's stalking statute.[107] In that case, the defendant followed the victim for six years prior to showing up at her house in Pennsylvania and raping her. The court allowed incidents committed in three other states to be used as evidence to establish the requisite course of conduct necessary to then establish the crime of stalking under Pennsylvania law, stating:

> [A] "course of conduct" for the crime of stalking is established by showing that more than one act of stalking occurred over a period of time. Because 18 Pa. C.S.A. § 102(a)(1) looks also to the "result" of certain conduct, [that section] does not require that all stalking acts occur in Pennsylvania. See, Bighum; Ohle. Accordingly, the Commonwealth may prosecute for stalking when one of a series of stalking acts occurs in Pennsylvania and when that stalking act completes a "course of conduct" for purposes of the stalking statute.[108]

Stalkers often cross state or tribal lines to monitor, harass, or commit violence against victims. Advancements in technology have made it possible for stalkers to terrorize victims who live not only in different states but virtually anywhere in the world. State and local prosecutors face difficulty in prosecuting stalking cases on the state level when stalkers commit acts in different jurisdictions. The model stalking code seeks to solve this problem by permitting prosecutors to bring a stalking case in a particular jurisdiction as long as the stalker

106 18 Pa. Cons. Stat. Ann. § 2709.1(b) (West 2005).

107 *Commonwealth v. Giusto*, 810 A.2d. 123, 126 (Pa. Super. 2002).

108 Ibid., 127; 18 Pa Cons. Stat. Ann. §§ 102(a)(1) and 2709(b) (West 2005).

initiated one act in the jurisdiction, or as long as one act had an effect on the victim in the jurisdiction. For example, if a stalker followed and assaulted a victim in California, and then made a telephone threat to kill her when the victim moved to New York, courts in either California or in New York would have jurisdiction over the stalking case. This provision ensures that stalkers cannot evade prosecution simply by committing acts in different jurisdictions.

Interstate stalking may demonstrate that a stalker is particularly persistent or dangerous due to the obsessive lengths to which the stalker will go to track the victim. Under Federal Interstate Stalking Law (18 USC §2261A), it is illegal to stalk across state or tribal lines or to use mail, e-mail, the Internet, or surveillance technology to stalk someone across state lines. The jurisdiction provision of the model stalking code is not intended to supplant the Federal law; rather, it provides additional protections for stalking victims.

Section 4 Conclusion

Stalking is a serious, prevalent crime that wreaks havoc on its victims. Victims feel great fear for their personal safety and, in many cases, their lives. Research indicates that stalking is not just a crime of harassment and annoyance but that it can be a precursor to serious violence—most often occurring between people who know each other. The use of technology by stalkers to terrorize and surveil victims, which first emerged in the 1990s, is likely to increase in the coming years. Law enforcement officials, prosecutors, and judges need to be equipped with the legal tools to allow early and effective intervention that responds to the ever-expanding methods used by stalkers.

The Model Stalking Code Advisory Board and drafters of the updated model stalking code hope that the proposed legislative language will provide a roadmap for ensuring the safety of stalking victims and holding offenders accountable. In summary, the updated "Model Stalking Code for the States" recommends that states review and, as necessary, modify their stalking laws to:

- Include a legislative intent section that emphasizes the strong connections between stalking and domestic violence and between stalking and sexual assault, and underscores the importance of early intervention by law enforcement;
- Incorporate a general intent requirement instead of a specific intent requirement;
- Use a reasonable person standard of fear instead of an actual fear standard, intending that this standard be interpreted to mean a reasonable person in the victim's circumstances;

- Include two statutory prongs that establish the level of fear required to constitute stalking: (1) that a reasonable person would fear for his or her safety or the safety of a third person; or (2) that a reasonable person would suffer other emotional distress;
- Eliminate any credible threat requirement;
- Expand the standard of fear to include fear for the safety of a third person in addition to fear for the victim's own safety;
- Define "course of conduct" to include guidance regarding the range of acts contemplated and to encompass stalking behavior accomplished by or through the use of any action, method, device, or means to ensure that current and other forms of technology or surveillance that stalkers may use are covered;
- Specifically exempt two defenses typically claimed by stalkers: (1) that the perpetrator was not given actual notice by the victim that his or her conduct was not wanted; or (2) that the stalker did not intend to cause the victim fear or to suffer other emotional distress;
- Classify stalking as a felony and/or consider a two-tiered system whereby enhanced penalties can be imposed in cases that involve aggravating factors; and
- Allow prosecution of the crime of stalking in any jurisdiction where any of the acts constituting the requisite course of conduct was initiated or had an effect on the victim.

Other Legislative Considerations

Although the updated model stalking code attempts to capture the most pressing concerns facing practitioners in the field, it may not address every stalking issue a jurisdiction may face. The following are legislative considerations that states may want to contemplate in conjunction with a review of their stalking laws.

Protective Provisions. Ensuring the safety of stalking victims should be a paramount goal for state legislatures working to strengthen their stalking and related laws. One way to accomplish this is to adopt statutory protective provisions for stalking victims both within and outside of a state's criminal code. For

example, legislation included in the criminal code can provide law enforcement and courts with the authority needed to monitor stalkers in order to better protect victims. Other measures may grant stalking victims access to civil remedies that they can pursue outside of the criminal justice process.[109] State lawmakers may wish to consider enacting legislation that addresses some of the following:

- Maintaining the confidentiality of information, the disclosure of which could endanger the victim;[110]
- Setting strict bail conditions;[111]
- Issuing an order while a case is pending or at sentencing that prohibits the defendant from contacting the victim, the victim's family, or associates of the victim;[112]
- Ordering the stalker to pay restitution to the victim;
- Requiring that a detention facility notify the victim or the victim's designee upon the release of the stalker;[113] or
- Ordering supervised probation upon the stalker's release from jail.[114]

Harassment and Cyberstalking Laws. Legislators may also want to review harassment laws in their states to make sure that individuals who engage in harassing behavior that does not rise to the level of stalking are held accountable. In addition, they may find it beneficial to re-evaluate any cyberstalking or cyberharassment laws that have been passed.[115] The advisory board intended the updated model stalking code to cover all forms of stalking, including stalk-

109 *See*, for example, Ky. Rev. Stat. Ann. § 400 (Michie 2005); R.I. Gen. Laws § 9-1-2.1; Va. Code Ann. § 8.01-42.3 (Michie 2005); and Wyo. Stat. Ann. § 1-1-126 (Michie 2005).

110 *See*, for example, Mass. Gen. Laws Ann. ch. 9A, §§ 1—7 (West 2005), Neb. Rev. Stat. §§ 42-1201—1210 (2005), and Okla. Stat. Ann. tit. 22, § 60.14 (West 2005) (address confidentiality programs); Cal. Veh. Code § 1808.2 (West 2005) and Fla. Stat. Ann. § 119.071 (West 2005) (confidentiality of personal information in certain department of motor vehicles records); and Ariz. Rev. Stat. Ann. § 16-153 (West 2005) and N.J. Stat. Ann. § 19:31-3.2 (West 2005) (address confidentiality in voter registration records).

111 *See*, for example, 725 Ill. Comp. Stat. 5/110-6.3 and 10; Ohio Rev. Code Ann. § 2903.212 (West 2005); Tenn. Code Ann. § 40-11-150 (2005); and Tex. Code Crim. P. art. 17.46 (West 2005).

112 See, for example, Alaska Stat. § 12.30.025; Conn. Gen. Stat. § 54-1k (West 2005); and Tenn. Code Ann. § 39-17-315 (2005).

113 *See*, for example, Cal. Penal Code § 3058.61 (2005) and Ga. Code Ann. § 16-5-93 (2005).

114 *See*, for example, Cal. Penal Code § 646.94 (West 2005).

115 *See*, for example, 720 Ill Comp. Stat. 5/12-7.5; N.C. Gen. Stat. § 14-196.3 (2005); R.I. Gen. Laws § 11-52-4.2; and Wis. Stat. Ann. § 947.0125 (West 2005).

ing accomplished through the use of a computer or any other form of technology. Having a separate law on the books for stalking via a particular form of technology (e.g., "cyber" technically refers to anything related to computers and networking, and likely would not cover stalking by global positioning systems or spycams), may create problems when the stalker is employing multiple methods of stalking. For example, if a stalker makes a threatening phone call and sends a threatening e-mail in a jurisdiction which has both a stalking law and a cyberstalking law, the state must make a choice whether to prosecute under one or the other. It is conceivable that the behaviors may not establish the course of conduct necessary to meet the elements of either statute, based simply on the different methods employed. Loopholes like this can be closed by the enactment of one solid stalking law. The model stalking code was designed to give states the tools to create just such a law.

Looking Ahead

The advisory board and the drafters of the updated "Model Stalking Code for the States" encourage legislators and other policy makers to remain vigilant in their efforts to address the crime of stalking. Ensuring victim safety and offender accountability requires an ongoing commitment to: review and amend stalking laws as needed; monitor law enforcement agents, prosecutors, judges, and other criminal justice professionals to make certain that stalking laws are enforced to the fullest extent possible; and promote public awareness about the crime of stalking and the services available to assist stalking victims.

For More Help

The Stalking Resource Center of the National Center for Victims of Crime helps communities across the country develop multidisciplinary responses to stalking through direct technical assistance and training. The Stalking Resource Center compiles a comprehensive and continually updated collection of state stalking laws; stays apprised of the latest trends and issues in stalking; and issues a wide range of articles, reports, and fact sheets on issues related to stalking. For more assistance, please visit our Web site at *www.ncvc.org/src* or call 202-467-8700.

Section 4 Appendices

Appendix A

"Project to Develop a Model Anti-Stalking Code for States," 43-48
National Institute of Justice, U.S. Department of Justice

Appendix B

"Stalking Fact Sheet"
Stalking Resource Center, National Center for Victims of Crime

Appendix C

"Strengthening Antistalking Statutes," Legal Series Bulletin #1
Office for Victims of Crime, U.S. Department of Justice

U.S. Department of Justice
Office of Justice Programs
National Institute of Justice

National Institute of Justice

Research Report

Project To Develop a Model Anti-Stalking Code for States

APPENDIX A

CHAPTER II

A MODEL ANTI-STALKING CODE FOR THE STATES

The model anti-stalking code development project has sought to formulate a constitutional and enforceable legal framework for addressing the problem of stalking.

The model code encourages legislators to make stalking a felony offense; to establish penalties for stalking that reflect and are commensurate with the seriousness of the crime; and to provide criminal justice officials with the authority and legal tools to arrest, prosecute, and sentence stalkers.

The Model Anti-Stalking Code for the States

Section 1. For purposes of this code:

(a) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person;

(b) "Repeatedly" means on two or more occasions;

(c) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who within the prior six months regularly resided in the household.

Section 2. Any person who:

(a) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family; and

(b) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family; and

(c) whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family;

is guilty of stalking.

Analysis and Commentary on Code Language

Section 1. For purposes of this code:

(a) "Course of conduct" means repeatedly maintaining a visual or physical proximity to a person or repeatedly conveying verbal or written threats or threats implied by conduct or a combination thereof directed at or toward a person;

(b) "Repeatedly" means on two or more occasions;

(c) "Immediate family" means a spouse, parent, child, sibling, or any other person who regularly resides in the household or who within the prior six months regularly resided in the household.

Commentary

Prohibited Acts

Unlike many state stalking statutes, the model code does not list specific types of actions that could be construed as "stalking." Examples of specific acts frequently proscribed in existing stalking statutes include following, non-consensual communication, harassing, and trespassing.

Some courts have ruled that if a statute includes a specific list, the list is exclusive. The model code, therefore, does not list specifically proscribed acts because ingenuity on the part of an alleged stalker should not permit him to skirt the law. Instead, the model code prohibits defendants from engaging in "a course of conduct" that would cause a reasonable person fear.

Credible Threat

Unlike many state stalking statutes, the model code does not use the language "credible threat." Stalking defendants often will not threaten their victims verbally or in writing but will instead engage in conduct which, taken in context, would cause a reasonable person fear. The model code is intended to apply to such "threats implied by conduct." Therefore the "credible threat" language, which might be construed as requiring an actual verbal or written threat, was not used in the model code.

"Immediate Family"

A stalking defendant may, in addition to threatening the primary victim, threaten to harm members of the primary victim's family. Under the provisions of the model code, such a threat to harm an immediate family member could be used as evidence of stalking in the prosecution for stalking of the primary victim.

The model code uses a definition of "immediate family" similar to one currently pending in the California legislature. This definition is broader than the traditional nuclear family, encompassing "any other person who regularly resides in the household or who within the prior six months regularly resided in the household."

If states want to consider further expanding the definition of "immediate family," they should be aware that broadening it too much may lead to challenges that the statute is overly broad.

Section 2. Any person who:

(a) purposefully engages in a course of conduct directed at a specific person that would cause a reasonable person to fear bodily injury to himself or herself or a member of his or her immediate family or to fear the death of himself or herself or a member of his or her immediate family; and

(b) has knowledge or should have knowledge that the specific person will be placed in reasonable fear of bodily injury to himself or herself or a member of his or her immediate family or will be placed in reasonable fear of the death of himself or herself or a member of his or her immediate family; and

(c) whose acts induce fear in the specific person of bodily injury to himself or herself or a member of his or her immediate family or induce fear in the specific person of the death of himself or herself or a member of his or her immediate family;

is guilty of stalking.

Commentary

Classification as a Felony

States should consider creating a stalking felony to address serious, persistent, and obsessive behavior that causes a victim to fear bodily injury or death. The felony statute could be used to handle the most egregious cases of stalking-type behavior. Less egregious cases could be handled under existing harassment or intimidation statutes. As an alternative, states may wish to consider adopting both misdemeanor and felony stalking statutes.

Since stalking defendants' behavior often is characterized by a series of increasingly serious acts, states should consider establishing a continuum of charges that could be used by law enforcement officials to intervene at various stages. Initially, defendants may engage in behavior that causes a victim emotional distress but does not cause the victim to fear bodily injury or death. For example, a defendant may make frequent but non-threatening telephone calls. Existing harassment or intimidation statutes could be used to address this type of behavior. States also may want to consider enacting aggravated harassment or intimidation statutes that could be used in situations in which a defendant persistently engages in annoying behavior. The enactment of a felony stalking statute would allow law enforcement officials to intervene in situations that may pose an imminent and serious danger to a potential victim.

Classification as a felony would assist in the development of the public's understanding of stalking as a unique crime,[84] as well as permit the imposition of penalties that would punish appropriately the defendant and provide protection for the victim.

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[84] This idea is further explained in a soon-to-be-published comment in *Georgetown Law Journal*: "Aside from statutorily defined components of stalking, a generally recognized notion of 'stalking' is evolving. Not only do anti-stalking statutes indicate recognition of stalking, public and judicial perceptions indicate that stalking is a discretely identifiable behavior. Although this public perception of stalking does not obviate the need for concise definitions in anti-stalking statutes, it does provide guidance as to the types of activity society is trying to limit through these statutes." Strikis, *supra*.

Of utmost importance is a state's decision to require the criminal justice system and related disciplines to take stalking incidents seriously.[85] A state's decision on how to classify stalking and how to establish its continuum of charges is of less importance.

"Conduct Directed at a Specific Person"

Under the model code's language, the stalking conduct must be directed at a "specific person." Threatening behavior not aimed at a specific individual would not be punishable under a statute similar to the model code. For example, a teenager who regularly drives at high speed through a neighborhood, scaring the residents, could not be charged under a stalking statute based upon the model code.

Fear of Sexual Assault

The model code language does not apply if the victim fears sexual assault but does not fear bodily injury. It is likely that victims who fear that a defendant may sexually assault them most likely also fear that the defendant would physically injure them if they resisted. Furthermore, since the human immunodeficiency virus (HIV), which causes acquired immunodeficiency syndrome (AIDS), could be contracted through a sexual assault, a victim is more likely to fear bodily injury or death, as well as psychological injury. Nevertheless, due to the nature of stalking offenses, states may want to consider expanding the language of their felony stalking statutes to include explicitly behavior that would cause a reasonable person to fear sexual assault in addition to behavior that would cause a reasonable person to fear bodily injury or death.

Intent Element

Under the provisions of the model anti-stalking code, a defendant must engage purposefully in activity that would cause a reasonable person fear and have or should have knowledge that the person toward whom the conduct is directed will be placed in reasonable fear. In other words, if a defendant consciously engages in conduct that he knows or should know would cause fear in the person at whom the conduct is directed, the intent element of the model code is satisfied.

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[85] *Id.*

A suspected stalker often suffers under a delusion that the victim actually is in love with him or that, if properly pursued, the victim will begin to love him. Therefore, a stalking defendant actually may not intend to cause fear; he instead may intend to establish a relationship with his victim. Nevertheless, the suspected stalker's actions cause fear in his victim. As long as a stalking defendant knows or should know that his actions cause fear, the alleged stalker can be prosecuted for stalking. Protection orders can serve as notice to a defendant that his behavior is unwanted and that it is causing the victim to fear.

Fear Element

Since stalking statutes criminalize what otherwise would be legitimate behavior based upon the fact that the behavior induces fear, the level of fear induced in a stalking victim is a crucial element of the stalking offense. The model code, which treats stalking as a felony, requires a high level of fear -- fear of bodily injury or death. Acts that induce annoyance or emotional distress would be punishable under statutes such as harassment or trespassing, that do not rise to the felony level and carry less severe penalties.

In some instances, a defendant may be aware, through a past relationship with the victim, of an unusual phobia of the victim's and use this knowledge to cause fear in the victim. In order for such a defendant to be charged under provisions similar to those in the model code, the victim actually must fear bodily injury or death as a result of the defendant's behavior and a jury must determine that the victim's fear was reasonable under the circumstances.

Stalking resource center

www.ncvc.org/src
Tel. (202) 467-8700
E-mail: *src@ncvc.org*

stalking fact sheet

THE NATIONAL CENTER FOR Victims of Crime

Crime victims can call:
1-800-FYI-CALL
M-F 8:30 AM–8:30 PM

WHAT IS STALKING?

While legal definitions of stalking vary from one jurisdiction to another, a good working definition of stalking is *a course of conduct directed at a specific person that would cause a reasonable person to feel fear.*

STALKING IN AMERICA

- 1,006,970 women and 370,990 men are stalked annually in the U.S.
- 1 in 12 women and 1 in 45 men will be stalked in their lifetime.
- 77% of female victims and 64% of male victims know their stalker.
- 87% of stalkers are men.
- 59% of female victims and 30% of male victims are stalked by an intimate partner.
- 81% of women stalked by a current or former intimate partner are also physically assaulted by that partner.
- 31% of women stalked by a current or former intimate partner are also sexually assaulted by that partner.
- 73% of intimate partner stalkers verbally threatened victims with physical violence, and almost 46% of victims experienced one or more violent incidents by the stalker.
- The average duration of stalking is 1.8 years.
- If stalking involves intimate partners, the average duration of stalking increases to 2.2 years.
- 28% of female victims and 10% of male victims obtained a protective order. 69% of female victims and 81% of male victims had the protection order violated.

[Tjaden & Thoennes. (1998). "Stalking in America," NIJ.]

IMPACT OF STALKING ON VICTIMS

- 56% of women stalked took some type of self-protective measure, often as drastic as relocating (11%). [Tjaden & Thoennes. (1998). "Stalking in America," NIJ]
- 26% of stalking victims lost time from work as a result of their victimization, and 7% never returned to work. [Tjaden & Thoennes.]
- 30% of female victims and 20% of male victims sought psychological counseling. [Tjaden & Thoennes.]
- The prevalence of anxiety, insomnia, social dysfunction, and severe depression is much higher among stalking victims than the general population, especially if the stalking involves being followed or having one's property destroyed. [Blauuw et. al. (2002). "The Toll of Stalking," *Journal of Interpersonal Violence*]

RECON STUDY OF STALKERS

- 2/3 of stalkers pursue their victims at least once per week, many daily, using more than one method.
- 78% of stalkers use more than one means of approach.
- Weapons are used to harm or threaten victims in 1 out of 5 cases.
- Almost 1/3 of stalkers have stalked before.
- Intimate partner stalkers frequently approach their targets, and their behaviors escalate quickly.

[Mohandie et al. "The RECON Typology of Stalking: Reliability and Validity Based upon a Large Sample of North American Stalkers." (In Press, *Journal of Forensic Sciences 2006*).]

STALKING AND INTIMATE PARTNER FEMICIDE*

- 76% of intimate partner femicide (murder) victims had been stalked by their intimate partner.
- 67% had been physically abused by their intimate partner.
- 89% of femicide victims who had been physically abused had also been stalked in the 12 months before the murder.
- 79% of abused femicide victims reported stalking during the same period that they reported abuse.
- 54% of femicide victims reported stalking to police before they were killed by their stalkers.

**The murder of a woman.*

[McFarlane et al. (1999). "Stalking and Intimate Partner Femicide," *Homicide Studies*].

STALKING ON CAMPUS

- 13% of college women were stalked during one six- to nine-month period.
- 80% of campus stalking victims knew their stalkers.
- 3 in 10 college women reported being injured emotionally or psychologically from being stalked.

[Fisher, Cullen, and Turner. (2000). "The Sexual Victimization of College Women," NIJ/BJS.]

THE STALKING RESOURCE CENTER

The Stalking Resource Center is a program of the National Center for Victims of Crime. Our dual mission is to raise national awareness of stalking and to encourage the development and implementation of multidisciplinary responses to stalking in local communities across the country.

We can provide you with:

- Training and Technical Assistance
- Protocol Development
- Resources
- Help in collaborating with other agencies and systems in your community

Contact us at: 202-467-8700 or *src@ncvc.org*.

STATE LAWS[1]

- Stalking is a crime under the laws of all 50 states, the District of Columbia, and the Federal Government.
- 15 states classify stalking as a felony upon the first offense.
- 34 states classify stalking as a felony upon the second offense and/or when the crime involves aggravating factors.[2]
- Aggravating factors may include: possession of a deadly weapon; violation of a court order or condition of probation/parole; victim under 16; same victim as prior occasions.

[1] Last updated October 2005.
[2] In Maryland, stalking is always a misdemeanor.

For a compilation of state, tribal and Federal laws visit: www.ncvc.org/src

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U.S. Department of Justice
Office of Justice Programs
Office for Victims of Crime

JANUARY 2002

STRENGTHENING ANTISTALKING STATUTES

LEGAL SERIES #1 BULLETIN

Message From THE DIRECTOR

Over the past three decades, the criminal justice field has witnessed an astounding proliferation of statutory enhancements benefiting people who are most directly and intimately affected by crime. To date, all states have passed some form of legislation to benefit victims. In addition, 32 states have recognized the supreme importance of fundamental and express rights for crime victims by raising those protections to the constitutional level.

Of course, the nature, scope, and enforcement of victims' rights vary from state to state, and it is a complex and often frustrating matter for victims to determine what those rights mean for them. To help victims, victim advocates, and victim service providers understand the relevance of the myriad laws and constitutional guarantees, the Office for Victims of Crime awarded funding to the National Center for Victims of Crime to produce a series of bulletins addressing salient legal issues affecting crime victims.

Strengthening Antistalking Statutes, the first in the series, provides an overview of state legislation and current issues related to stalking. Although stalking is a crime in all 50 states, significant variation exists among statutes as to the type of behavior prohibited, the intent of the stalker, whether a threat is required, and the

Continued on page 2

Introduction

Stalking is a crime of intimidation. Stalkers harass and even terrorize through conduct that causes fear or substantial emotional distress in their victims. A recent study sponsored by the National Institute of Justice (NIJ) (U.S. Department of Justice) and the Centers for Disease Control and Prevention estimates that 1 in 12 women and 1 in 45 men have been stalked during their lifetime.[1] Although stalking behavior has been around for many years, it has been identified as a crime only within the past decade. Most laws at the state level were passed between 1991 and 1992. As more is learned about stalking and stalkers, legislatures are attempting to improve their laws.[2]

In 1993, under a grant from NIJ, a working group of experts was assembled to develop a model state stalking law.[3] Many of its recommendations have been followed as states have amended their laws.[4]

Status of the Law

Generally, stalking is defined as the willful or intentional commission of a series of acts that would cause a reasonable person to fear death or serious bodily injury and that, in fact, does place the victim in fear of death or serious bodily injury. Stalking is a crime in every state. Every state has a stalking law, although the harassment laws of some states also encompass stalking behaviors. In most states, stalking is a Class A or first degree misdemeanor except under certain circumstances, which include stalking in violation of a protective order, stalking while armed, or repeat offenses. In addition, states typically have harassment statutes, and one state's harassment law might encompass behaviors that would be considered stalking in another state.

Significant variation exists among state stalking laws. These differences relate primarily to the type of repeated behavior that is prohibited, whether a threat is required as part of stalking, the reaction of the victim to the stalking, and the intent of the stalker.

Prohibited Behavior

Most states have broad definitions of the type of repeated behavior that is prohibited, using terms such as "harassing," "communicating," and "nonconsensual contact." In

OVC

Continued from page 1

reaction of the victim to the stalking. This bulletin and the others in the Legal Series highlight various circumstances in which relevant laws are applied, emphasizing their successful implementation.

We hope that victims, victim advocates, victim service providers, criminal justice professionals, and policymakers in states across the Nation will find the bulletins in this series helpful in making sense of the criminal justice process and in identifying areas in which rights could be strengthened or more clearly defined. We encourage you to use these bulletins not simply as informational resources but as tools to support victims in their involvement with the criminal justice system.

John W. Gillis
Director

some states, specific descriptions of stalking behavior are included in the statute. For example, Michigan's stalking law provides that unconsented contact includes, but is not limited to, any of the following:

1. Following or appearing within sight of that individual.
2. Approaching or confronting that individual in a public place or on private property.
3. Appearing at that individual's workplace or residence.
4. Entering onto or remaining on property owned, leased, or occupied by that individual.
5. Contacting that individual by telephone.
6. Sending mail or electronic communications to that individual.
7. Placing an object on or delivering an object to property owned, leased, or occupied by that individual.[5]

A handful of states have narrow definitions of stalking. Illinois, for example, limits stalking to cases involving following or keeping a person under surveillance.[6] Maryland requires that the pattern of conduct include approaching or pursuing another person.[7] Hawaii is similar, limiting stalking to cases in which the stalker pursues the victim or conducts surveillance of the victim.[8] Connecticut limits stalking to following or lying in wait.[9] Wisconsin requires "maintaining a visual or physical proximity to a person."[10]

Threat

When stalking laws were first adopted in states across the country, many laws required the making of a "credible threat" as an element of the offense. Generally, this was defined as a threat made with the intent and apparent ability to carry out the threat. As understanding of stalking has grown, however, most states have modified or eliminated the credible-threat requirement. Stalkers often present an implied threat to their victims. For example, repeatedly following a person is generally perceived as threatening. The threat may not be expressed but may be implicit in the context of the case.

Only two states—Arkansas and Massachusetts—require the making of a threat to be part of stalking,[11] although a few other states require an express threat as an element of aggravated stalking. Most states currently define stalking to include implied threats or specify that threats can be, but are not required to be, part of the pattern of harassing behavior.

Reactions of the Victim

Stalking is defined in part by a victim's reaction. Typically, stalking is conduct that "would cause a reasonable person to fear bodily injury to himself or a member of his immediate family or to fear the death of himself or a member of his immediate family"[12] or "would cause a reasonable person to suffer substantial emotional distress"[13] and does cause the victim to have such a reaction. Some states refer to conduct that seriously "alarms," "annoys," "torments," or "terrorizes" the victim, although many of those states also require that the conduct result in substantial emotional distress.[14] Others refer to the victim's fear for his or her "personal safety";[15] feeling "frightened, intimidated, or threatened";[16] or fear "that the stalker intends to injure the person, another person, or property of the person."[17] In general, however, stalking statutes provide that the conduct must be of a nature that would cause a specified reaction on the part of the victim and in fact does cause the victim to have that reaction.[18]

Intentions of the Stalker

Originally, most stalking statutes were "specific intent" crimes; they required proof that the stalker intended to cause the victim to fear death or personal injury or to have some other particular reaction to the stalker's actions. The subjective intent of a person, however, can be difficult to prove. Therefore, many states have revised their statutes to make stalking a "general intent" crime; rather than requiring proof that the defendant intended to cause a reaction on the part of the victim, many states simply require that the stalker intentionally committed prohibited acts.

Other states require that in committing the acts, the defendant must know, or reasonably should know, that the acts would cause the victim to be placed in fear. The latter approach was recommended in the NIJ Model Antistalking Code project. At least two courts have discussed the model's language in finding that general intent is sufficient.[19]

Exceptions

Most states have explicit exceptions under their stalking laws for certain behaviors, commonly described simply as "constitutionally protected activity." Many also specifically exempt licensed investigators or other professionals operating within the scope of their duties;[20] however, it may not be necessary to provide such exceptions within the statute itself. The Supreme Court of Illinois interpreted that state's stalking laws to prohibit only conduct performed "without lawful authority," even though the laws do not contain that phrase. The court reasoned that "[t]his construction . . . accords with the legislature's intent in enacting the statutes to prevent violent attacks by allowing the police to act before the victim was actually injured and to prevent the terror produced by harassing actions."[21]

Aggravating Circumstances

Many state codes include an offense of aggravated stalking or define stalking offenses in the first and second degrees. Often, the higher level offense is defined as stalking in violation of a protective order,[22] stalking while armed with a deadly weapon,[23] a second or subsequent conviction of stalking,[24] or stalking a minor.[25] Many states without a separately defined higher offense provide for enhanced punishment for stalking under such conditions.

Challenges to Stalking Laws

Most of the cases challenging the constitutionality of stalking laws focus on one of two questions: whether the statute is overbroad or whether it is unconstitutionally vague. A statute is unconstitutionally overbroad when it inadvertently criminalizes legitimate behavior. In a Pennsylvania case, the defendant claimed the stalking statute was unconstitutional because it criminalized a substantial amount of constitutionally protected conduct. In that case, the defendant engaged in a campaign of intimidating behavior against a judge who had ruled against him in a landlord-tenant case. For nearly a year, the defendant made regular phone calls and distributed leaflets calling the judge "Judge Bimbo," "a cockroach," "a gangster," and "a mobster." During one of his many calls to the judge's chambers, her secretary asked him if his intentions were "to alarm and disturb" the judge. The defendant replied, "I would hope that my calls alarm her. I am working very hard at it. If my calls are disturbing, wait until she sees what happens next." He also called and spoke about the bodyguard hired for the judge and the judge carrying a gun "to let [her] know that he's watching and knows what is going on."

The court in that case found that the statute was not overbroad and did not criminalize constitutionally protected behavior. The court noted that "[t]he appellant cites us no cases, nor are we able to locate any, announcing a constitutional right to 'engage in a course of conduct or repeatedly committed acts toward another person [with the] intent to cause substantial emotional distress to the person.' "[26]

Defendants have also argued that stalking laws are unconstitutionally vague. The essential test for vagueness was set out by the U.S. Supreme Court in 1926. A Government restriction is vague if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[27] Whether a given term is unconstitutionally vague is left to the interpretation of each state's courts.

In a New Jersey stalking case, the court rejected the defendant's claim that the statute was unconstitutionally vague, finding the defendant's conduct "unquestionably proscribed by the statute." In that case, the defendant had maintained physical proximity to the victim on numerous occasions, late at night, that the court found to be threatening, purposeful, and directed at the victim. He repeatedly asked for sexual contact that he knew was unwanted, and he implied that she had better agree. "To suggest, as the defendant does, that his activity could be seen as the pursuit of 'normal social interaction' is absurd. On the contrary, his conduct was a patent violation of the statute."[28]

In a Michigan case, the defendant also argued that the stalking statutes were unconstitutionally vague and violated his first amendment right to free speech. The court disagreed. "Defendant's repeated telephone calls to the victim, sometimes 50 to 60 times a day whether the victim was at home or at work, and his verbal threats to kill her and her family do not constitute protected speech or conduct serving a legitimate purpose, even if that purpose is 'to attempt to reconcile,' as defendant asserts."[29]

Claims that stalking laws were unconstitutionally vague have focused on the wide range of terms commonly used in such laws. For example, courts have ruled that the following terms were not unconstitutionally vague: "repeatedly,"[30] "pattern of conduct,"[31] "series,"[32] "closely related in time,"[33] "follows,"[34] "lingering

outside,"[35] "harassing,"[36] "intimidating,"[37] "maliciously,"[38] "emotional distress"[39] "reasonable apprehension,"[40] "in connection with,"[41] and "contacting another person without the consent of the other person."[42]

Courts have also determined that terms such as "without lawful authority"[43] and "serves no legitimate purpose"[44] were not unconstitutionally vague. The Oregon Court of Appeals, however, did invalidate that state's stalking law on the grounds that the term "legitimate purpose" was unconstitutionally vague.[45] The court found that the statute did not tell a person of ordinary intelligence what was meant by the term "legitimate purpose"; therefore, the statute gave no warning as to what conduct must be avoided. The Oregon legislature later revised the statute to remove the phrase.

The Supreme Court of Kansas found that state's stalking statute unconstitutionally vague because it used the terms "alarms," "annoys," and "harasses" without defining them or using an objective standard to measure the prohibited conduct. "In the absence of an objective standard, the terms . . . subject the defendant to the particular sensibilities of the individual. . . . [C]onduct that annoys or alarms one person may not annoy or alarm another. . . . [A] victim may be of such a state of mind that conduct that would never annoy, alarm, or harass a reasonable person would seriously annoy, alarm, or harass this victim."[46] Kansas has since amended its statute, and the amended statute has been ruled constitutional. The court specifically found that the revised law included an objective standard, that is, the standard of a "reasonable person," and defined the key terms "course of conduct," "harassment," and "credible threat."[47]

Similarly, the Texas Court of Criminal Appeals found that state's original antistalking law unconstitutionally vague. Although there were several factors in this ruling, the expansive nature of the prohibited conduct was a key point in the decision. That conduct included actions that would "annoy" or "alarm" the victim. The court observed that "the First Amendment does not permit the outlawing of conduct merely because the speaker intends to annoy the listener and a reasonable person would in fact be annoyed."[48] The Texas Legislature subsequently revised the law to correct the problem.

Massachusetts's stalking law was also declared unconstitutionally vague because it provided that a person could be guilty of stalking if that person repeatedly harassed the victim. "Harass" was defined as a pattern of conduct or series of acts. Thus, the court found that the statutory requirement of repeated harassment meant that a person "must engage repeatedly (certainly at least twice) in a pattern of conduct or series of acts over a period of time. . . . One pattern or one series would not be enough." The court noted that the legislature presumably intended a single pattern of conduct or a single series of acts to constitute the crime but did not state this with sufficient clarity to meet the constitutional challenges.[49] The Commonwealth has since revised its stalking law to address the issue.

Other courts have disagreed with the reasoning of the Massachusetts decision. The Rhode Island Supreme Court declared that the Massachusetts court's "metaplasmic[†] approach . . . has attracted little, if any following." The court found that the statute, as drafted, met the constitutional test by giving adequate warning to potential offenders of the prohibited conduct. "It indeed defies logic to conclude that a defendant would have to commit more than one series of harassing acts in order to be found guilty of stalking."[50] The D.C. Court of Appeals reached a similar conclusion.[51]

Attempted Stalking

At least one state has grappled with the question of whether a person can be charged with attempted stalking. In Georgia, a defendant made harassing and bizarre phone calls to his ex-wife. The defendant was arrested and released under the condition that he was to have "[a]bsolutely no contact with the victim or the victim's family." A few weeks later, he called his ex-wife's office, claiming to be the district attorney, and asked personal questions about his ex-wife. He later attempted to call his ex-wife at the office, but she was out of town. He told a coworker to tell his ex-wife that "when she gets home she can't get in." The Georgia Supreme Court found that it was not absurd or impractical to criminalize attempting to stalk, which under the terms of the statute meant attempting to follow, place under surveillance, or contact another, when it was done with the requisite specific intent to cause emotional distress by inducing a reasonable fear of death or bodily injury. A concurring Justice noted that to hold otherwise would be to permit a stalker "to intimidate and harass his intended victim simply by communicating his threats to third parties who (the stalker knows and expects) will inform the victim."[52]

[†] *Metaplasmia:* alteration of regular verbal, grammatical, or rhetorical structure usually by transposition of the letters or syllables of a word or of the words in a sentence. *Metaplasmic*, adj. (*Webster's Third New International Dictionary*, 1971).

Current Issues

Cyberstalking

As the use of computers for communication has increased, so have cases of "cyberstalking." A 1999 report by the U.S. Attorney General called cyberstalking a growing problem. After noting the number of people with access to the Internet, the report states, "Assuming the proportion of cyberstalking victims is even a fraction of the proportion of persons who have been the victims of offline stalking within the preceding 12 months, there may be potentially tens or even hundreds of thousands of victims of recent cyberstalking incidents in the United States."[53]

Many stalking laws are broad enough to encompass stalking via e-mail or other electronic communication, defining the prohibited conduct in terms of "communication," "harassment," or "threats" without specifying the means of such behavior. Others have specifically defined stalking via e-mail within their stalking or harassment statute.

For example, California recently amended its stalking law to expressly include stalking via the Internet.[54] Under California law, a person commits stalking if he or she "willfully, maliciously, and repeatedly follows or harasses another person and . . . makes a credible threat with the intent to place that person in reasonable fear for his or her safety, or the safety of his or her immediate family." The term "credible threat" includes "that performed through the use of an electronic communication device, or a threat implied by a pattern of conduct or a combination of verbal, written, or electronically communicated statements." "Electronic communication device" includes "telephones, cellular phones, computers, video recorders, fax machines, or pagers."

Bail Restrictions

States are grappling with the matter of pretrial release of people charged with stalking. Because stalkers often remain dangerous after being charged with a crime, states have sought means to protect victims at the pretrial stage. Many states permit the court to enter a no-contact order as a condition of pretrial release.[55] A few give the court discretion to deny bail. For example, Illinois allows a court to deny bail when the court, after a hearing, "determines that the release of the defendant would pose a real and present threat to the physical safety of the alleged victim of the offense and denial of . . . bail . . . is necessary to prevent fulfillment of the threat upon which the charge is based."[56]

Lifetime Protection Orders

Stalkers frequently remain obsessed with their targets for years. Requiring victims to file for a new protective order every few years can be unduly burdensome. Because victims may have attempted to conceal their whereabouts from the stalkers, reapplying for a protective order may inadvertently reconnect stalkers with their victims. In New Jersey, this problem has been alleviated. A conviction for stalking in that state operates as an application for a permanent restraining order. The order may be dissolved on application of the victim.[57]

Conclusion

Stalking is a serious and pervasive criminal offense. The Nation is increasingly aware of the danger stalkers pose and of the need for effective intervention. Research into the nature and extent of stalking is ongoing. As more is learned about effective responses to stalkers, laws will continue to evolve. Victim advocates and victim service providers must work closely with law enforcement and prosecutors to identify what additional legislative changes are needed to better protect stalking victims.

About This Series

OVC Legal Series bulletins are designed to inform victim advocates and victim service providers about various legal issues relating to crime victims. The series is not meant to provide an exhaustive legal analysis of the topics presented; rather, it provides a digest of issues for professionals who work with victims of crime.

Each bulletin summarizes—

- Existing legislation.
- Important court decisions in cases where courts have addressed the issues.
- Current trends or "hot topics" relating to each legal issue.

Notes

1. Tjaden, Patricia, and Nancy Thoennes (1998). *Stalking in America: Findings From the National Violence Against Women Survey*. Washington, DC: U.S. Department of Justice, National Institute of Justice and the Centers for Disease Control and Prevention.

2. This bulletin focuses on state stalking laws. For the federal interstate stalking law, see 18 U.S.C. § 2261A (2001).

3. National Criminal Justice Association (1993). *Project To Develop a Model Anti-Stalking Code for States*. Washington, DC: National Institute of Justice. To receive a copy of the final report of this project, contact the National Criminal Justice Reference Service at 1–800–851–3420 and ask for publication NCJ 144477.

4. For more indepth information on the problem of stalking, see *Stalking and Domestic Violence: The Third Annual Report to Congress Under the Violence Against Women Act*, Washington, DC: U.S. Department of Justice, Violence Against Women Grants Office, 1998.

5. Mich. Stat. Ann. § 28.643(8) (2000).

6. 720 Ill. Comp. Stat. 5/12-7.3 (2001).

7. Md. Ann. Code art. 27, § 124 (2001).

8. Haw. Rev. Stat. §§ 711-1106.4, -1106.5 (2000).

9. Conn. Gen. Stat. §§ 53a-181d, -181e (2001).

10. Wis. Stat. Ann. § 940.32 (2000).

11. Ark. Stat. Ann. § 5-71-229 (2001); Mass. Gen. Laws Ann. ch. 265, § 43 (2001).

12. N.J. Stat. Ann. § 2C:12-10 (2001).

13. For example, Cal. Penal Code § 646.9 (Deering 2001); Kan. Stat. Ann. § 21-3438 (2000).

14. Kan. Stat. Ann. § 21-3438 (2000). See also Ky. Rev. Stat. § 508.150 (2001); Me. Rev. Stat. Ann. tit. 17-A, § 210-A (2000); Miss. Code Ann. § 97-3-107 (2001).

15. N.H. Rev. Stat. Ann. § 633:3-a (2000).

16. N.M. Stat. Ann. § 30-3A-3 (2000).

17. Wash. Rev. Code Ann. § 9A.46.110 (2001).

18. The specific terms are subject to the interpretation of each state's courts.

19. *State* v. *Neuzil*, 589 N.W.2d 708 (Iowa 1999); *State* v. *Cardell*, 318 N.J. Super. 175, 723 A.2d 111 (N.J. Super. Ct. App. Div. 1999).

20. For example, Ark. Stat. Ann. § 5-71-229 (2001).

21. *People* v. *Bailey*, 167 Ill. 2d 210, 657 N.E.2d 953 (1995).

22. For example, Ala. Code § 13A-6-91 (2001); N.M. Stat. Ann. § 30-3A-3.1 (2000).

23. For example, Ark. Stat. Ann. § 5-71-229 (2001) (stalking in the first degree).

24. For example, Vt. Stat. Ann. § 13-1063 (2001).

25. For example, Fla. Stat. § 784.048 (2000).

26. *Commonwealth* v. *Schierscher*, 447 Pa. Super. 61, 668 A.2d 164 (Pa. Super. Ct. 1995).

27. *Connally* v. *General Construction Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926).

28. *State* v. *Cardell*, 318 N.J. Super. 175, 723 A.2d 111 (N.J. Super. Ct. App. Div. 1999).

29. *People* v. *White*, 212 Mich. App. 298, 536 N.W.2d 876 (Mich. Ct. App. 1995).

30. *State* v. *Martel*, 273 Mont. 143, 902 P.2d 14 (1995); *State* v. *McGill*, 536 N.W.2d 89 (S.D. 1995).

31. *State* v. *Dario*, 106 Ohio App. 3d 232, 665 N.E.2d 759 (Ohio Ct. App. 1995).

32. *State* v. *Randall*, 669 So.2d 223 (Ala. Crim. App. 1995).

33. *State* v. *Dario*, 106 Ohio App. 3d 232, 665 N.E.2d 759 (Ohio Ct. App. 1995).

34. *State* v. *Lee*, 135 Wash. 2d 369, 957 P.2d 741 (1998); *People* v. *Zamudio*, 293 Ill. App. 3d 976, 689 N.E.2d 254 (Ill. App. Ct. 1997).

35. *State* v. *Schleirermacher*, 924 S.W.2d 269 (Mo. 1996).

36. *State* v. *Martel*, 273 Mont. 143, 902 P.2d 14 (1995).

37. Id.

38. *State* v. *McGill*, 536 N.W.2d 89 (S.D. 1995).

39. *Woolfolk* v. *Commonwealth*, 18 Va. App. 840, 447 S.E.2d 530 (Va. Ct. App. 1994); *Salt Lake City* v. *Lopez*, 313 Utah Adv. Rep. 26, 935 P.2d 1259 (Utah Ct. App. 1997).

40. *State* v. *Martel*, 273 Mont. 143, 902 P.2d 14 (1995).

41. *People* v. *Baer*, 973 P.2d 1225 (Colo. 1999).

42. *Johnson* v. *State*, 264 Ga. 590, 449 S.E.2d 94 (1994).

43. *State* v. *Lee*, 135 Wash. 2d 369, 957 P.2d 741 (1998).

44. *People* v. *Tran*, 47 Cal. App. 4th 253, 54 Cal. Rptr. 2d 650 (Cal. Ct. App. 1996).

45. *State* v. *Norris-Romine*, 134 Or. App. 204, 894 P.2d 1221 (Or. Ct. App. 1995).

46. *State* v. *Bryan*, 259 Kan. 143, 910 P.2d 212 (1996).

47. *State* v. *Rucker*, 1999 Kan. LEXIS 410 (1999).

48. *Long* v. *State*, 931 S.W.2d 285, 290 n. 4 (Tex. Crim. App. 1996).

49. *Commonwealth* v. *Kwiatkowski*, 418 Mass. 543, 637 N.E.2d 854 (1994).

50. *State* v. *Fonseca*, 670 A.2d 1237 (R.I. 1996).

51. *United States* v. *Smith*, 685 A.2d 380 (App. D.C. 1996).

52. *State* v. *Rooks*, 266 Ga. 528, 468 S.E.2d 354 (1996).

53. *Cyberstalking: A New Challenge for Law Enforcement and Industry*, A Report From the Attorney General to the Vice President, August 1999, p. 6.

54. Cal. Penal Code § 646.9 (Deering 2001).

55. For example, Alaska Stat. § 12.30.025 (2001); Md. Ann. Code art. 27, § 616½ (2001).

56. 725 Ill. Comp. Stat. 5/110-4, -6.3 (2001).

57. N.J. Stat. § 2C:12-10.1 (2001).

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December 23, 2021

Chairman Charles Allen
Committee on the Judiciary & Public Safety,
Council of the District of Columbia
1350 Pennsylvania Avenue NW, Suite 110
Washington, DC 20004

Re: Statement of the District of Columbia Courts before the Committee on the Judiciary & Public Safety, Council of the District of Columbia on B24-416, Revised Criminal Code Act of 2021

Dear Chairman Allen:

Thank you, Chairman Allen, and the members the Committee on the Judiciary & Public Safety for the opportunity to submit testimony on the B24-416, the Revised Criminal Code Act of 2021 (hereinafter, "RCCA") on behalf of District of Columbia Court of Appeals, Superior Court of the District of Columbia, and Court System, (collectively, "D.C. Courts" or "Courts").

The D.C. Court of Appeals is the highest court for the District of Columbia, and reviews all final orders, judgments and specified interlocutory orders of the Superior Court, and other administrative agency matters. The Superior Court handles all local trial matters, including civil, criminal, domestic violence, family court, probate, tax, landlord-tenant, small claims, and traffic. The Court System provides the administrative support and day-to-day management for the Court of Appeals and the Superior Court.

As an initial matter, the Courts would like to commend the D.C. Criminal Code Reform Commission and all those who participated in drafting a comprehensive revision of the District of Columbia criminal code. As noted in the Commission's Recommendations for the Council and Mayor, the code has not been overhauled since 1901 and many of the improvements are well overdue.

Next, we want to address the potential impact of the RCCA on the D.C. Courts. Any comments on substantive code provisions will be submitted for consideration during the legislative process and inclusion in the legislative record.

We anticipate the impact on the D.C. Courts to be extensive. The code changes required by the RCCA will require parallel changes to many of the Court's operations, predominately in the Superior Court. Most notably, the expansion of the right to jury trial for misdemeanor offenses, and expansion of the Incarceration Reduction Amendment Act (hereinafter, "IRAA") to allow sentence review of every felony sentence after 15 years' imprisonment will require additional judicial and personnel resources to handle the filings, hearings and trials associated with the increase in proceedings.

Additional study and analysis will be necessary to quantify the impact of expanding the right to misdemeanor jury trials on the Courts. During the pandemic and as of December 10, 2021, three thousand eight hundred ninety (3890) misdemeanor and traffic cases have been filed in the Superior Court, and none proceeded to jury trial. In 2019 (the last full year pre-pandemic), eleven thousand three hundred fifty-two (11,352) misdemeanor and traffic cases were filed, and only twenty-three (23) of the six hundred thirty-five (635) total misdemeanor and traffic trials were jury trials. Felony trial statistics over four (4) pre-pandemic years indicate that fifty-nine percent (59%) of all felony trials are jury trials instead of bench trials. If all of the 2019 misdemeanor and traffic cases had been jury eligible and 59% proceeded to jury trial, then the number of misdemeanor and traffic jury trials would have been approximately three hundred seventy-five (375) instead of twenty-three (23). An additional three hundred fifty-two (352) jury trials for Superior Court are significant. The current number of active Superior Court judges is forty-eight (48), and the number handling criminal jury trials is fifteen (15). Given these numbers and the existing backlog of criminal and civil matters arising out of the pandemic, the ability and process to absorb the potential number of new jury trials must be carefully considered and painstakingly crafted.

The exponential increase in the number of misdemeanor trials in the Superior Court will necessarily require an increase in the number of jurors called for service. Thirteen thousand, six hundred seventy-four (13,674) District of Columbia residents were called for jury service in criminal cases in 2019; a corresponding increased number of jurors to support the new misdemeanors trials would be summoned under the RCCA, along with increased costs for the related juror fees and expenses. The change will also require additional facilities, equipment, and judicial and non-judicial personnel, e.g., juror's office and courtroom staff, court reporters, and interpreters. Judicial time will also increase; a judge may conclude a bench trial in 1 day whereas a jury trial may extend for 2 to 3 days. A similar demand on judicial resources and related costs for mitigation specialists, expert witnesses, and prisoner travel expenses can be anticipated for the new IRAA matters.

We further expect an increase in the number of appellate matters in the Court of Appeals as litigants test the evidentiary record required to support the new standards of criminal liability or elements of revised criminal offenses and defenses. Also, before the appellate courts will be challenges to efficacy of imposed penalties, terms of imprisonment and supervised release. The increase in appeals without additional judicial resources as the Courts establish new precedent for a myriad of new legal constructs may, in turn, precipitate a backlog in the Courts' appeal process.

Numerous other operational and systems changes will be required for the intake, processing, and disposition of criminal matters under the RCCA. Many of our information technology systems, including case management, are configured for the current criminal code. The

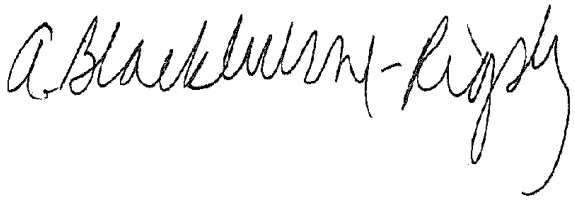
Courts' interfaces and data feeds with other criminal justice agencies similarly rely on the current code structure. Incorporating new provisions and making numerical and topical changes to existing offenses will necessitate wide-ranging programing and coding work for the Courts and other entities.

In addition, the Courts will need to make comprehensive changes to forms, templates, operating procedures, and court rules. Support of the revisions to important legal resources used by judges, parties, and other participants, such as jury instructions and sentencing guidelines, will also be required.

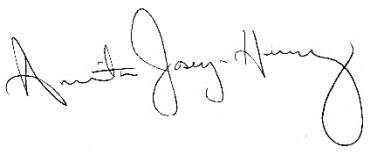
Finally, institutional reorienting and strengthening the Courts' knowledge and understanding of the new Code will be an imperative. Training for the judiciary and Courts' personnel will need to be developed and presented along with information and education for the legal community and public at large.

The Courts are not yet able to predict the costs associated with implementation and conformity to the changes required by the RCCA. For this reason, we believe that a needs assessment of the infrastructure, personnel, and related financial cost is warranted, along with a budget request for additional Courts' funding. We further believe that the bill should include sufficient time between the enactment and the effective date, including a phased transition plan to incorporate new criminal code offenses under the RCCA.

The D.C. Courts, criminal justice institutions, partner entities, and the public will be well served by this approach. Again, thank you, on behalf of the Courts, for the opportunity to present the views of the judicial branch about the RCCA's impact on the Courts.



Anna Blackburne-Rigsby
Chief Judge
District of Columbia Court of Appeals
Chair
Joint Committee on Judicial Administration, DC Courts



Anita Josey-Herring
Chief Judge
Superior Court of the District of Columbia